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Carlos Manuel Vázquez

Georgetown University Law Center, vazquez@law.georgetown.edu

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Carlos Manuel Vázquez

Professor of Law

Georgetown University Law Center

vazquez@law.georgetown.edu

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The Federal "Claim" in the District Courts: *Osborn, Verlinden,* and Protective Jurisdiction

Carlos M. Vázquez†

In the title of his influential article, "The Federal 'Question' in the District Courts,"¹ Professor Paul Mishkin placed scare quotes around the word "question" to remind us that the phrase "federal question" is a misnomer as a description of the "arising under" jurisdiction of the district courts. He criticized the oft-repeated dictum that a case does not arise under federal law unless it truly involves a disputed issue of federal law, noting that this formulation of the "arising under" test "stems from an uncritical transference to the lower federal courts of a standard developed for the exercise of the Supreme Court's appellate jurisdiction."² In fact, it is clear that a case arises under federal law for purposes of 28 U.S.C. § 1331 if the plaintiff raises a federal claim—that is, if his cause of action is created by federal law—even if everyone agrees about the proper interpretation of federal law and the only disputes concern the meaning of state law or the facts. That is as it should be. The purpose of the "arising under" jurisdiction of the district courts is not solely, or even primarily, to resolve disputed questions of federal law, but to provide a hospitable forum for the vindication of federal rights. Such rights can be frustrated by an inhospitable forum not just through the misinterpretation of federal law, but through misinterpretation of state law or through biased fact-finding. For this reason, Professor Mishkin acknowledged that, in place of the term

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† John Carroll Research Professor of Law, Georgetown University Law Center. I am grateful for helpful comments from Vicki Jackson, Jonathan Molot, and David Vladeck, and the participants in this symposium. I am especially grateful for the thoughtful responses of Ernest Young in this symposium. I dedicate this Article to Paul Mishkin, for his inspiration and his encouragement.

1. Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953).

2. *Id.* at 170.

"federal question," "[a]ccuracy . . . would be better served by some such term as 'federal claim.'"³

This was a central insight of the first part of Professor Mishkin's article, discussing the scope of the statutory grant of federal "arising under" jurisdiction.⁴ In my view, Professor Mishkin's insight is also the key to understanding the proper scope of the "arising under" clause of Article III—the topic of the second part of his article. The failure to keep this point in mind explains much of the broad, controversial language in *Osborn v. Bank of the United States*,⁵ language that the Supreme Court and commentators have subsequently hesitated to embrace. That broad language reflects Chief Justice Marshall's misguided conception of *Osborn* as a "federal question" case. Had he viewed *Osborn* as a "federal claim" case, he could have upheld the statute in somewhat narrower terms. Indeed, much of his analysis, including his famous "original ingredient" language,⁶ can be usefully understood through a "federal claim" lens.

More recently, in *Verlinden v. Central Bank of Nigeria*,⁷ in considering the validity of a statute conferring jurisdiction over cases brought by aliens against foreign states, the Court adhered to Marshall's "federal question" paradigm but distanced itself from *Osborn*'s "remote possibility" test. It upheld the statute on the theory that *every* case that the statute permitted to be adjudicated in the federal courts involved an actual question of federal law, namely, whether the foreign state was entitled to immunity under the standards of the Foreign Sovereign Immunities Act (FSIA).⁸ This holding is unsatisfying because, under the statute, there is no need for the court to consider any question of foreign sovereign immunity if the defendant appears but does not raise an immunity defense. In such cases, there would be no colorable issue of federal law, and therefore no true "federal question." I argue that a "federal claim" analysis would have yielded a more persuasive rationale for upholding the statute.

Part I of this Article explains why the "federal question" analysis in *Osborn* is unpersuasive, and how a "federal claim" analysis would have provided a more convincing, and narrower, rationale for the holding. I argue that the jurisdictional grant in *Osborn* should have been upheld because all claims by the Bank were created by federal law—the federal law creating the Bank and giving it all of its powers—and that Congress properly conferred jurisdiction over the claims in order to provide a more hospitable forum for the vindication of such rights. Part II explains why the

3. *Id.* at 171 (emphasis in original). He nevertheless opted to use the "more conventional term 'federal question'" in his article. *Id.* at n.61.

4. *Id.* at 168-76.

5. 22 U.S. 738 (1824).

6. *Id.* at 824.

7. 461 U.S. 480 (1983).

8. *Id.* at 492-94.

Court's "federal question" analysis in *Verlinden* is similarly unpersuasive and how a "federal claim" analysis would once again have produced a more convincing decision. The jurisdictional grant should have been upheld in *Verlinden* because all claims against foreign states are created by federal law—the federal law partially withdrawing the immunity that foreign states had always enjoyed by virtue of international law, as construed by our courts. *Verlinden* differs from *Osborn* in that Congress conferred jurisdiction to provide a *less* hospitable forum for those raising claims against foreign states. I conclude that this is an equally valid reason to confer jurisdiction over federally-created claims.

Part III explores the outer boundaries of federal claim theory. I conclude that federal claim analysis supports a congressional grant of jurisdiction over any class of cases over which Congress has legislative power. Congress may confer jurisdiction over such cases by creating a federal claim that adopts or incorporates as federal law whatever state or foreign law would otherwise govern the dispute. The effective scope of Congress's power under the adoption approach would be the same as under Professor Wechsler's version of protective jurisdiction. My proposed refinement of Wechsler's approach, though largely formal, helps address some of the objections that have been directed at it. Professor Wechsler was right when he claimed that the greater power to confer jurisdiction by displacing state law includes the lesser power to confer jurisdiction without displacing state law. Federal claim analysis shows that Congress may confer jurisdiction over claims it creates in order to make available a more (or less) hospitable forum for the adjudication of such claims. That justification for conferring jurisdiction is also compelling when the federal claim that Congress has created is to be resolved by reference to federal law that does not differ in content from the state or foreign law that would otherwise apply.

I

OSBORN

Chief Justice Marshall's opinion in *Osborn* has come to stand for the broad principle that a suit arises under federal law for purposes of Article III's "arising under" clause if there is any possibility that a disputed question of federal law will emerge during the course of the case. This Part first reviews *Osborn's* holding, and then addresses why a "federal claim" analysis would have been preferable.

A. *Osborn* as a "Federal Question" Case

Osborn concerned the constitutionality of a statute conferring jurisdiction on the federal district courts in any suit brought by the Bank of

the United States.⁹ The substantive issue in *Osborn* was federal too, but Chief Justice Marshall was not content to uphold the statute as applied. He considered at length whether the grant of jurisdiction would have been valid in a hypothetical case governed substantively by state law. He posited a case brought by the Bank to enforce a contract (which was not entirely hypothetical, as it was the posture of a companion case, *Bank of the United States v. Planters' Bank of Georgia*¹⁰).

In analyzing the constitutional issue, the Court zeroed in on the nature of the questions to be decided in the case.¹¹ The appellants had argued that the jurisdictional grant was invalid because a suit brought by the Bank could be expected to raise non-federal as well as federal questions.¹² Marshall properly rejected that argument as untenable, noting that Article III's "arising under" provision limits the appellate jurisdiction of the Supreme Court as well as the original jurisdiction of the federal courts, and the Court's appellate jurisdiction is of course not negated by the fact that the case involves non-federal issues in addition to federal ones.¹³ Marshall then reasoned that, because the original jurisdiction of the federal courts has to be decided at the commencement of the case, when it is unclear which issues will be disputed, Congress has the power to confer federal jurisdiction over any case in which there is a possibility that a question of federal law will be raised.¹⁴

Thus, in considering the case of a contract action brought by the Bank, the Court focused on the nature of the questions to be decided:

When a Bank sues, the first question which presents itself, and which lies at the foundation of its cause is, has this legal entity a right to sue? . . . This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question too depends on a law of the United States. These are important questions and they exist in any possible case.¹⁵

It did not matter that the questions were not actually raised in the case:

The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the

9. *Osborn*, 22 U.S. at 738.

10. 22 U.S. 904 (1824).

11. *Osborn*, 22 U.S. at 745.

12. *Id.* at 819.

13. *Id.* at 820-22.

14. *Id.* at 821-23.

15. *Id.* at 823-24.

tribunal to be changed. . . . The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. . . . The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.¹⁶

Marshall's opinion in *Osborn* has been read as maintaining that a suit arises under federal law for purposes of Article III as long as there is a possibility that a disputed question of federal law will arise in the case. Indeed, some have described the *Osborn* test as being satisfied by the "remote possibility" that a federal question will be raised.¹⁷ Those who have read *Osborn* this way have been reluctant to embrace the test. Thus, Justice Frankfurter, dissenting in *Lincoln Mills*, expressed skepticism about *Osborn*'s holding, which he described as recognizing that "Congress may confer [federal arising under jurisdiction] whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question."¹⁸ Similarly, the Court in *Verlinden*, after describing *Osborn* as having held that "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law,"¹⁹ noted that "[t]he breadth of that conclusion has been questioned"²⁰ (quoting Frankfurter's "remote possibility" reading), and concluded that it did not have to decide the "precise boundaries" of Article III in the case before it.²¹

It is not surprising that the "remote possibility" test has encountered substantial resistance among courts and scholars. Such a test imposes no limit at all on Congress's ability to confer original jurisdiction on the federal courts. Any case governed by state law raises at least the remote possibility of a federal question arising – for example, the question of the state law's constitutionality, or questions about whether state procedures comply with federal constitutional requirements. An interpretation of Article III's "arising under" provision as authorizing Congress to confer jurisdiction over virtually any case governed by state law would be untenable, as it would be inconsistent with the Founders' decision to extend federal jurisdiction only to a limited set of cases.

It is far from clear that Marshall actually contemplated a "remote possibility" test. For example, he took pains to explain that his holding would not necessarily require the upholding of a statute conferring

16. *Id.* at 824.

17. *Textile Union Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 482 (1957) (Frankfurter, J., dissenting).

18. *Id.* at 471 (Frankfurter, J., dissenting).

19. *Verlinden*, 461 U.S. at 492.

20. *Id.*

21. *Id.* at 493.

jurisdiction over any case brought by a naturalized citizen²²—a statute that would appear to be valid under a “remote possibility” test. Nevertheless, Marshall’s focus on the need to resolve federal questions, and his conclusion that federal jurisdiction can be based on those questions even if they are not raised in the case, seem amenable to the broad interpretation that has rightly given courts and commentators pause.

Justice Johnson, dissenting in *Osborn*, also focused on the nature of the questions involved in the case as determining whether the case arises under federal law. He agreed with Marshall that the existence of non-federal questions did not vitiate “arising under” jurisdiction,²³ but rejected Marshall’s suggestion that federal questions could confer jurisdiction even if not raised in the case. In his view, federal jurisdiction could not be based “on a mere hypothesis,”²⁴ that is, “merely on the ground that a [federal] question might *possibly* be raised.”²⁵ The federal district courts had to be authorized to resolve questions of federal law, but they did not have to be available for cases in which no such questions were in fact raised. He suggested, reasonably, that if the federal questions did not appear in the plaintiff’s complaint, then federal jurisdiction could be exercised through removal of the case from state court once the federal question was raised.²⁶

If Marshall and Johnson were correct in their apparent assumption that “arising under” jurisdiction depended on the nature of the legal questions to be resolved, then Johnson’s position was certainly the more defensible. Federal jurisdiction would have been available under Johnson’s approach for those cases truly implicating that purpose, while the jurisdiction of the state courts would have been preserved for cases not implicating it. But Marshall and Johnson both appear to have overlooked another important purpose of “arising under” jurisdiction, a far more important purpose of the federal district courts than resolving issues of federal law—providing a hospitable forum for the vindication of federal rights. This purpose is implicated even when there is no disputed issue of federal law in the case. It is implicated whenever one of the parties relies on federal law. This idea underlies Justice Holmes’s construction of the general “arising under” statute: a suit arises under the law that creates the cause of action.²⁷ This formulation is regarded as valid as a rule of inclusion, if not as a rule of exclusion.²⁸ Any case that would fall within the “arising under” statute as construed by Holmes must, of course, fall within the “arising under” clause of Article III.

22. *Osborn*, 22 U.S. at 827.

23. *Id.* at 884 (Johnson, J., dissenting).

24. *Id.* (Johnson, J., dissenting).

25. *Id.* at 874 (Johnson, J., dissenting) (emphasis in original).

26. *Id.* at 889 (Johnson, J., dissenting).

27. *Am. Well Works Co. v. Layne & Bowler*, 241 U.S. 257, 260 (1916).

28. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964).

B. Osborn as a "Federal Claim" Case

That Marshall and Johnson failed to recognize the vindication of federal rights as an important purpose of "arising under" jurisdiction is perhaps attributable to the fact that there was no statute conferring a general "arising under" jurisdiction on the federal courts at the time. The constitutional "arising under" provision had been implemented primarily through the Supreme Court's appellate jurisdiction over state court judgments, and the Supreme Court had construed Article III primarily in that context. It is thus understandable that the Court might uncritically transfer an analysis tailored to its own appellate jurisdiction to a statute conferring original jurisdiction on a lower court.

Had Marshall and Johnson acknowledged that one of the purposes of federal "arising under" jurisdiction under Article III was to provide a hospitable forum for the vindication of federal rights, they might have found the statute before them to be a particularly appropriate use of Congress's power under that clause. As Johnson noted in his dissent, jurisdiction was needed because of state court hostility to the Bank.²⁹ Marshall's statement that the appellate jurisdiction of the Supreme Court would be inadequate because by then the case would have been "shaped" adversely to federal interests by the state courts was a more subtle acknowledgement of the need to protect it from possible state court hostility.³⁰ These considerations should have led the Court to uphold the statute not because of the possibility that propositions of federal law might be disputed in cases brought by the Bank, but because all suits brought by the Bank seek to vindicate federal rights—the federal right of the Bank to contract and engage in the other operations authorized by the act of incorporation.³¹ Because state court hostility to the Bank threatened to frustrate these federal rights, congressional conferral of jurisdiction over these claims advanced one of the core purposes of the constitutional "arising under" provision.

One possible objection to this analysis would build on Justice Frankfurter's observation that the Framers of Article III anticipated the possibility of bias against certain parties and authorized federal jurisdiction in certain circumstances to guard against such bias.³² Such protection was the purpose of the diversity clauses of Article III, and those clauses exhaust the categories of cases in which federal jurisdiction may be conferred for such purposes. Though the observation is reasonable, it does not undermine the "federal claim" rationale for upholding the statute in *Osborn*. A distinction should be drawn between a statute designed to

29. *Osborn*, 22 U.S. at 871.

30. *Id.* at 823.

31. *Id.*

32. *Lincoln Mills*, 353 U.S. at 475.

protect certain *parties* from state court bias and a statute designed to protect federal *rights* from state court bias. The diversity provisions may exhaust the situations in which federal jurisdiction may be granted solely for the purpose of protecting certain parties against possible bias, but that leaves Congress with the power to grant jurisdiction to protect federal rights. In the case of a party created by federal law, such as the Bank, the party and the law are merged. Federal law gives the Bank the right to operate. To protect the federal right of the Bank to operate thus protects not just the Bank but also the law creating the Bank.

A fresh look at both the Marshall and Johnson opinions in *Osborn* reveals significant support for a "federal claim" reading of that case. First, Marshall appeared to recognize that, because the Bank was a creature of federal law, its rights were federal rights. The conventional federal question/remote possibility interpretation of *Osborn*, though certainly not without support in Marshall's analysis, is not the only available interpretation. The most direct support for the "federal claim" reading is this paragraph:

The charter of incorporation not only creates [the Bank], but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?³³

Marshall stopped short of espousing a "federal claim" theory, failing to acknowledge that a purpose of federal jurisdiction over suits brought by the Bank was to provide a hospitable forum for the vindication of the federal rights emanating from the Bank's charter. Instead, he reverted to a discussion of the centrality to the suit of numerous "questions" of federal law, such as the right to sue and make contracts and to acquire property, each of which "forms an original ingredient in any cause" initiated by the Bank.

It fell to Johnson in dissent to refer to the states' hostility towards the Bank. Johnson also recognized that one purpose of federal jurisdiction is the vindication of rights which "'live, move, and have [their] being' in a law of the United States."³⁴ But he appears to have reserved this category for causes of action explicitly granted by federal law. In his view, this category included only "four or five different actions given by [the Bank's]

33. *Osborn*, 22 U.S. at 823.

34. *Id.* at 887-88.

act of incorporation; particularly that against the President and Directors for over-issuing,"³⁵ because in such cases "the plaintiff must count on the law itself as the ground of his action."³⁶ He failed to recognize that *all* of the Bank's claims had their being in federal law in the sense that they would not have existed but for the federal law creating the Bank and giving it the right to contract and conduct other business. Had he done so, he could have justified the grant of jurisdiction as based on the valid need to provide a forum that would not be hostile to those claims.

Johnson's interpretation of "arising under" might be appropriate as a construction of the general "arising under" statute, which may be said to require that the federal claim arise "directly" under federal law.³⁷ However, the "arising under" provision of Article III is amenable to a broader construction, permitting the conferral of jurisdiction when federal law creates the claim indirectly, such as by creating the holder of the claim. Under the constitutional provision, it should have been sufficient that any action brought by the Bank truly "has its being" only by virtue of the federal law that created the Bank and gave it all of its powers.

II

VERLINDEN

It was not until a century and a half after *Osborn* that a Supreme Court majority opinion again gave extensive consideration to the scope of Article III's "arising under" clause as applied to the original jurisdiction of the district courts. This Part argues that the Court's conclusion in *Verlinden v. Central Bank of Nigeria*³⁸ that all suits against foreign states raise an actual question of federal law under the FSIA provided an unpersuasive justification for upholding federal jurisdiction. As with *Osborn*, a "federal claim" analysis would have provided a more compelling rationale.

A. *Verlinden* as a "Federal Question" Case

At issue in *Verlinden* was the validity of 28 U.S.C. § 1330, which confers jurisdiction on the district courts in all cases brought against a foreign state in which the foreign state is not entitled to immunity. The diversity provisions of Article III authorize jurisdiction over cases between a State, or citizens thereof, and foreign states, but the plaintiff in *Verlinden* was a Dutch corporation, not a State or citizen thereof. The Court of Appeals construed § 1330 to confer jurisdiction in such cases, but struck the section down as exceeding congressional power under Article III.³⁹ The

35. *Id.* at 888.

36. *Id.*

37. See Mishkin, *supra* note 1, at 165.

38. 461 U.S. 480 (1983).

39. *Verlinden B.V. v. Central Bank of Nig.*, 647 F.2d 320 (2d Cir. 1981).

Supreme Court agreed that the statute conferred jurisdiction over cases between aliens and foreign states, but upheld the statute as within Article III's "arising under" provision. As in *Osborn*, the particular case before the court clearly fell within Article III's "arising under" clause, as there was an actual disputed issue of foreign sovereign immunity in the case. (Indeed, the district court had held that the defendant was entitled to immunity.⁴⁰) But, again as in *Osborn*, the Court considered whether the statute would be valid in all of its applications.

Like Chief Justice Marshall in *Osborn*, Chief Justice Burger's opinion for a unanimous Court in *Verlinden* appeared to view the existence of "arising under" jurisdiction as turning on the nature of the questions of law involved in the case. The Court noted that *Osborn* had been understood as adopting a "possible federal question" test, and it distanced itself from such a "broad" reading of the constitutional provision.⁴¹ It concluded that it could uphold the statute without endorsing *Osborn's* broad test because every suit brought against a foreign state involves an actual, rather than a speculative, question of federal law—namely, whether the foreign state is entitled to foreign sovereign immunity.⁴² That question is governed by separate provisions of the Foreign Sovereign Immunities Act.⁴³ Because § 1330 confers jurisdiction only over suits against foreign states in which the state is not entitled to immunity, the Court reasoned that every case against a foreign state requires the courts to apply the FSIA's immunity provisions and hence raises an actual question of federal law.⁴⁴

The Court's conclusion that all suits against foreign states raise an actual question of immunity under the FSIA is unpersuasive. In any given case it may be so clear that a foreign state is not entitled to immunity under the FSIA's immunity provisions that a foreign state would be highly unlikely to raise a claim of immunity.⁴⁵ Indeed, raising the argument in those circumstances might subject the state's lawyers to sanctions under Rule 11.⁴⁶ If so, then the existence of an immunity issue in any given case would be a possibility, not a certainty.

The Court's opinion took the position that, because § 1330 makes the absence of immunity a condition of subject-matter jurisdiction, the federal court must consider and apply the FSIA's immunity provisions in any case against a foreign state, whether the foreign state raises a claim of immunity

40. *Verlinden B.V. v. Central Bank of Nig.*, 488 F. Supp. 1284 (S.D.N.Y. 1980).

41. *Verlinden*, 461 U.S. at 492.

42. *Id.* at 493-94.

43. 28 U.S.C. § 1605 (2000).

44. *Id.*

45. See Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361, 381 (2002).

46. FED. R. CIV. P. 11.

or not.⁴⁷ But this response is unpersuasive given the content of the immunity provisions of the FSIA. Section 1604 of the FSIA provides that states are immune unless the suit falls within one of the exceptions to immunity found in § 1605.⁴⁸ The first of those exceptions is waiver.⁴⁹ It is clear, moreover, that a state waives its immunity by failing to raise a claim of immunity in court.⁵⁰ Thus, although it is true that objections to subject-matter jurisdiction are ordinarily not waived by a failure to raise the objection in court,⁵¹ the ordinary rule does not apply in this case because this particular immunity is defined as being subject to waiver. If the state does not raise a claim of immunity, there is no need for a court to consider a claim of immunity on its own motion because, by virtue of § 1605 of the FSIA, the very failure to raise the immunity causes the loss of the immunity.

The Court might respond that it is only by virtue of § 1605 that there is no need for the court to consider any issue of immunity under the FSIA if the defendant does not raise the issue. That is true, but it does not establish that there is a need in every case to decide an actual question of federal law. It is also true that the current interpretation of the FSIA's waiver exception might be challenged, but that fails to distinguish *Verlinden* from *Osborn*, where it was similarly possible that a litigant might renew a challenge to the Bank's right to make contracts or to sue. It was enough for the *Osborn* Court that the issue *might* be raised, and it was this aspect of *Osborn* that the Court in *Verlinden* refused to endorse. The fact is that the existence of an actual federal question in a case against a foreign state is a possibility, not a certainty, and thus the *Verlinden* Court's reason for concluding that it did not have to consider the continuing validity of *Osborn*'s "possible federal question" test was unsound.

B. *Verlinden* as a "Federal Claim" Case

As in *Osborn*, a "federal claim" analysis would have provided a more persuasive rationale in *Verlinden* for upholding the grant of jurisdiction in all of its applications. Just as all claims brought by the Bank of the United States were creatures of federal law and hence federal claims, all claims brought against foreign states are similarly creatures of federal law and hence federal claims.⁵² In the latter case, the claims were created by federal

47. *Verlinden*, 461 U.S. at 493.

48. 28 U.S.C. § 1604 (2000).

49. *Id.* § 1605(a)(1).

50. See JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 454 (Transnational Publishers 2d ed. 2003).

51. See generally R. FALLON, D. MELTZER & D. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1409 (5th ed. 2003).

52. This argument is developed in Carlos M. Vázquez, Comment, *Verlinden B.V. v. Central Bank of Nigeria: Federal Jurisdiction Over Cases Between Aliens and Foreign States*, 82 COLUM. L.

law not because federal law created the plaintiff and gave it its powers, but because federal law removed in part an otherwise applicable immunity that would have shielded the defendant. For most of our history, U.S. courts adhered to the absolute theory of foreign sovereign immunity, under which foreign states were immune from all suits brought against them.⁵³ With the State Department's issuance of the Tate Letter in 1952, we shifted to the restrictive theory, retaining immunity for the governmental activities of foreign states but no longer recognizing their immunity for commercial activities.⁵⁴ We recognized the general immunity of foreign states both before and after 1952 because that is what was required by international law as interpreted by our courts, taking into account as appropriate the views of the executive.⁵⁵ In the FSIA, passed in 1976,⁵⁶ Congress codified the restrictive theory of immunity and added a few additional exceptions not yet recognized by international law. Subsequent amendments have created additional exceptions, most notably an exception for suits against certain terrorist states.⁵⁷

Insofar as the FSIA and its amendments created exceptions to the immunity of foreign sovereigns not previously recognized by international law, actions against foreign states are clearly the creature of federal statute.⁵⁸ Insofar as the FSIA codified exceptions to foreign sovereign immunity already recognized by international law, the issue is more complicated. Such claims might be said to have been created by international law. The modern position is that international law has the status of federal common law.⁵⁹ If so, then these claims, too, are creatures of federal law. They were created through the gradual evolution of customary international law, as definitively recognized by the U.S.

REV. 1057 (1982) [hereinafter Vázquez, *Federal Jurisdiction Over Cases Between Aliens and Foreign States*].

53. See, e.g., *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812); *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562 (1962).

54. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Attorney General, 26 Dept. State Bull. 984-85 (May 19, 1952), reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976).

55. See *Verlinden*, 461 U.S. at 487.

56. 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976).

57. See 28 U.S.C. § 1605(a)(7).

58. To be clear: I am not suggesting that, to prevail in a suit against a foreign state, it is sufficient for the plaintiff to establish that his case falls within one of the exceptions to foreign sovereign immunity contained in § 1605. That section merely removes the barrier of immunity, subjecting the foreign state to liability under some other law. My point, however, is that the removal of the immunity barrier can be said to have created the claim against the state in the sense that, without it, the claim could not be maintained.

59. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111, editors' note 3 (1987). See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (citing with approval *Philip Jessup, The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 730 (1939)); *The Paquete Habana*, 175 U.S. 677, 700 (1900).

executive branch in the Tate Letter.⁶⁰ Although the status of customary international law as federal law has been questioned in recent years,⁶¹ the Supreme Court has yet to repudiate the modern position. Its recent decisions appear, if anything, to reinforce it.⁶² We need not resolve that controversy here, however, as even those scholars who do not regard customary international law generally as federal law presumably would regard the State Department's recognition of the restrictive theory of foreign sovereign immunity in the Tate Letter as a federal act transforming the relevant principle of international law into federal law.⁶³ If so, then the Tate Letter is the federal act that created claims against foreign states that otherwise would not have been maintainable in state or federal courts. In any event, the subsequent codification of the restrictive theory in a federal statute should suffice to render such claims "federal claims" for purposes of Article III's "arising under" provision. Even if states were once free to determine the circumstances in which foreign states may be sued, such determinations are now exclusively a matter of federal law.

The Court of Appeals in *Verlinden* rejected the argument that "arising under" jurisdiction could be grounded on the need to decide questions of foreign sovereign immunity because, in its view, foreign sovereign immunity is itself a jurisdictional issue.⁶⁴ The court believed that basing federal jurisdiction on the need to apply the very jurisdictional statute under review would be circular. The concern has some validity. If Congress enacted a statute conferring federal jurisdiction over certain types of claims, to defend the constitutionality of the law on the ground that there is a need to interpret and apply the jurisdictional limitation in that very statute would smack of bootstrapping. (A similar "bootstrapping" criticism has been directed at Professor Wechsler's version of protective jurisdiction, discussed in Part III.)

The Supreme Court dismissed the Court of Appeals' concern by characterizing foreign sovereign immunity as a "substantive" issue, not a purely jurisdictional one.⁶⁵ It is not entirely clear what the Court meant by "substantive." There is support for the proposition that foreign sovereign

60. See *Republic of Aus. v. Altmann*, 541 U.S. 677, 689-90 (2004) (citing *Arias v. S. S. Fletero*, Adm. No. 7492 (E.D. Va. 1952)).

61. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Ernest L. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 392-94 (2002) [hereinafter Young, *Sorting Out the Debate*].

62. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). But cf. Curtis A. Bradley, Jack L. Goldsmith, and David H. Moore, *Sosa, Customary International Law and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 873 (2007).

63. Cf. Curtis A. Bradley and Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2162 (1999) (post-*Erie* law of foreign sovereign immunity was "federal law by virtue of a political-branch authorization").

64. *Verlinden B.V. v. Central Bank of Nig.*, 647 F.2d 320, 328 n.21 (2d Cir. 1981).

65. *Verlinden*, 461 U.S. at 493.

immunity is substantive in the sense that it immunizes the state from liability to private parties, not just from the jurisdiction of courts.⁶⁶ In other words, someone injured through foreign state conduct in circumstances in which the foreign state is entitled to immunity lacks not just a procedural right to come into court, but also a right to recover damages from the foreign state. Justice Holmes in *The Western Maid*, considering the sovereign immunity of the United States, held that the immunity was substantive in this sense—it did not just close the courthouse door, it actually prevented a liability from attaching. Thus, even if a court could somehow obtain jurisdiction, it would have to hold that the United States was not liable.⁶⁷

In a more recent case concerning the retroactivity of the FSIA's foreign sovereign immunity rules, the Supreme Court equivocated about whether it regarded the immunity as substantive in this sense.⁶⁸ In the end, however, the validity of § 1330 on a "federal claim" theory does not depend on whether the immunity is substantive in this sense or merely procedural. It is enough to save the "federal claim" argument from circularity that the immunity applies not just in federal courts, but also in state courts. The provisions of the FSIA specifying the circumstances in which foreign states can be sued do not relate solely to *federal* jurisdiction. Since they govern whether foreign states can be sued *at all* in the courts of this country, these rules are precisely analogous to the provisions of the Bank's act of incorporation giving the Bank the capacity to sue. If the latter provisions suffice to render all claims by the Bank federal claims, then the FSIA's provisions withdrawing foreign sovereign immunity should suffice to do the same.

From the "federal claim" perspective, the principal difference between *Osborn* and *Verlinden* is that, in the latter case, federal jurisdiction was not conferred primarily to provide a hospitable forum for the vindication of the plaintiff's federal claim. The purpose of the grant of federal jurisdiction was to protect the defendant.⁶⁹ Congress feared bias against foreign states by juries, and it sought to protect against such bias by authorizing removal

66. For amplification, see Vázquez, *Federal Jurisdiction Over Cases Between Aliens and Foreign States*, *supra* note 52. Of course, the FSIA confers on foreign states a jurisdictional immunity—i.e., an immunity from being sued in court. See 28 U.S.C. § 1604. The question is whether it does only this, or whether it *also* confers an immunity from liability. Cf. 28 U.S.C. § 1606 (arguably recognizing an immunity from liability coextensive with the state's immunity from suit). See *also infra* note 132.

67. See *The Western Maid*, 257 U.S. 419 (1922).

68. See Altmann, *supra* note 60. For a discussion of this case, see Carlos M. Vázquez, Altmann v. Austria and the Retroactivity of the Foreign Sovereign Immunities Act, 3 J. OF INT'L CRIM. JUSTICE 207 (2005).

69. See *infra* notes 70-71.

to federal court and banning jury trials there.⁷⁰ (The feared bias was not from state as opposed to federal juries, but from juries as opposed to judges; removal to federal court was the option chosen either because Congress believed that it lacked the power to preclude jury trials in the state courts or because it regarded it as the less intrusive option.) Congress also thought that the federal courts were likely to be more experienced in handling the complex commercial cases that the FSIA authorized against foreign states, and more sensitive to the federal foreign relations policies likely to be implicated in suits against foreign states.⁷¹

Clearly, Congress has the power to confer "arising under" jurisdiction to provide a hospitable forum for the vindication of a defendant's federal rights. The "arising under" clause of Article III authorizes federal jurisdiction on the basis of a federal defense.⁷² Jurisdiction would exist even if there were no occasion in the case to interpret federal law. For example, the FSIA entitles foreign states to immunity for their governmental as distinguished from their commercial acts (assuming no other exception to immunity applies).⁷³ There is no question that Congress could confer jurisdiction on the federal courts to provide a hospitable forum for the vindication of that immunity, even if everyone in the case agreed about the meaning of the terms "commercial" and "governmental." Whether the case is based upon a commercial as opposed to a governmental act could depend in a given case on whether certain alleged facts occurred, and the existence of those facts could be the sole disputed issue in the case. Congress might legitimately want such a case in federal court because a state court hostile to Congress's decision to retain the foreign state's immunity for governmental acts might manipulate its factual findings to frustrate the foreign state's right not to be held liable for such acts.

But, if federal jurisdiction served only to ensure a hospitable forum for that defense, Justice Johnson might reasonably insist that jurisdiction be deferred until the defense were in fact raised.⁷⁴ As discussed above, the constitutional issue in *Verlinden* would be simple in any case presenting a

70. See DELLAPENNA, *supra* note 50, at 661; *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000); *In re Delta America Re Ins. Co.*, 900 F.2d 890, 893 (6th Cir. 1990).

71. H.R. REP. NO. 94-1487 at 6612, 6631; DELLAPENNA, *supra* note 50, at 661. In a series of cases discussed in Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775 (2007) [hereinafter Young, *Stalking the Yeti*], courts have relied on such policies in holding that federal jurisdiction exists under the general federal question statute in cases implicating foreign relations. I agree with Professor Young that these cases are unpersuasive as an interpretation of those statutes, in the light of such judicially developed glosses as the well-pleaded complaint rule. But, in my view, there is no question that Congress could confer federal jurisdiction in such cases.

72. See, e.g., *Mesa v. California*, 489 U.S. 121 (1989).

73. 28 U.S.C. § 1605 (a)(2).

74. See *Osborn*, 22 U.S. at 887-88.

plausible defense of sovereign immunity. Federal claim analysis is necessary only for those cases against foreign states presenting no sovereign immunity issue. The hard case is therefore the one in which there is no plausible sovereign immunity defense—for example, an action in which the defendant's acts are clearly commercial and the only question is, say, how much injury they caused, or whether the defendant was negligent, or whether the plaintiff should have mitigated. The distinctive feature of federal claim analysis is that it does not turn on the possibility that particular federal issues will arise and have to be decided. Rather, jurisdiction is proper under that theory because all the claims authorized to be brought in the federal courts are federal claims. In the hard case, the federal court would not be providing a hospitable forum for the adjudication of the substantive defense that Congress provided. Rather, the federal forum would be guarding against feared bias toward the holder of the federal defense, whether or not the defense is raised. Should it matter under federal claim analysis that jurisdiction is being conferred to provide a hospitable forum for the party seeking to *defeat* the federal claim?

The current statutory scheme for general federal question removal suggests that Congress may confer "arising under" jurisdiction to provide a *less* hospitable forum for the holder of the federal claim. Under § 1441,⁷⁵ a defendant may remove a suit from state to federal court when the suit could have been brought in federal court under § 1331.⁷⁶ As noted, original jurisdiction exists under § 1331 when the plaintiff's claim is based on federal law. Thus, § 1441 permits a defendant to invoke the jurisdiction of the federal courts when the party whose claim is based on federal law prefers to be in state court, presumably because he believes the state courts offer a more hospitable forum for his federal claim. It thus appears that, under § 1441, a permissible purpose of federal jurisdiction is to provide a hospitable forum to a party seeking to defeat a federal claim. In other words, Congress may confer jurisdiction on the federal courts to guard against excessive hospitality towards federal claims.⁷⁷ It has never been suggested that § 1441 is unconstitutional when it authorizes jurisdiction in such cases.

Nor would it make sense to permit Congress to seek to provide a hospitable forum only to the party whose claim is based on federal law.

75. 28 U.S.C. § 1441 (2000).

76. *Id.* § 1331.

77. In many cases, one might say that the purpose of allowing defendants to remove when the plaintiff has a federal claim is instead to promote uniformity in the interpretation of federal law. This purpose is advanced, however, only when there is a dispute about the meaning of federal law. Yet, as we have seen, original jurisdiction exists under § 1331 where the plaintiff's claim is based on federal law, even if there is no disputed issue of federal law. Allowing the defendant to remove such a case from state to federal court can only serve the purpose of providing a forum that is less hospitable to the federal rights involved.

Suppose that Congress created a federal right of action for a certain kind of harm, establishing a uniform national rule on the subject. Assume further that, before the enactment of this federal law, most states recognized a common-law right of action for the harm, but their laws varied considerably. The laws of some states were more favorable to plaintiffs while the laws of other states were less favorable. The judges in the former states could be expected to be excessively hospitable to the new federal right, while the judges in the other states could be expected to be insufficiently hospitable. A grant of federal jurisdiction over the new federal claim will simultaneously guard against both possibilities. Federal claim analysis shows that both purposes are valid.

There would thus appear to be no constitutional problem when Congress authorizes federal jurisdiction over claims that it has created for the purpose of providing a forum that will not be excessively hospitable to those claims. Congress conferred jurisdiction over claims against foreign states precisely for that reason. *Verlinden* is thus best regarded as a federal claim case.

III

PROTECTIVE JURISDICTION

Parts I and II argue that federal jurisdiction exists whenever the federal claim is a creature of federal law. Federal law might create a claim by endowing an individual with a particular right, but it might also create the claim less directly by, for example, creating an entity and endowing it with the power to contract (as in *Osborn*), or by withdrawing an immunity from liability (as in *Verlinden*). Federal creation of the claim would support a grant of "arising under" jurisdiction even if the law that governs the claim is that of a state or a foreign government. These two examples are relatively unproblematic, as federal law in both cases created a claim that otherwise would not exist—the first because the party would not otherwise exist, the second because the defendant was previously protected by an immunity conferred by principles of international law long recognized by our courts. Federal claim analysis, as defended thus far, would appear to support the validity of a grant of federal jurisdiction in a number of contexts that have been regarded as questionable. For example, the grant of jurisdiction over claims brought by a bankruptcy trustee seeking to recover the debts of the bankrupt could be viewed as based on federal law's creation of the trustee's claim—federal law transfers claims of the bankrupt to the trustee.⁷⁸ Similarly, the Diplomatic Relations Act authorizes federal jurisdiction over state-law disputes involving the traffic

78. *Lincoln Mills*, 353 U.S. at 471 (Frankfurter, J., dissenting).

accidents of foreign diplomats, but also creates a "direct action" against the insurer of a diplomatic or consular official.⁷⁹

Other actual or proposed jurisdiction-conferring statutes, however, are not as easily sustained under the federal claim theory as I have defended it so far. For example, § 301 of the Taft-Hartley Act confers jurisdiction on the federal courts over actions for violation of labor-management contracts in industries affecting commerce.⁸⁰ Before it was construed in *Lincoln Mills* as authorizing federal common law-making,⁸¹ many courts and commentators assumed that it conferred jurisdiction over disputes governed by state law. The Class Action Jurisdiction Act, a bill introduced in 1969 but never enacted, would have conferred federal jurisdiction over certain consumer actions based on state law.⁸² More recently, in response to the attacks of September 11, 2001, Congress passed the Air Transportation Safety and System Stabilization Act, which creates a federal right of action incorporating "the law, including the choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by federal law."⁸³

To address the constitutionality of jurisdictional grants such as these, it is necessary to explore the outer bounds of the "federal claim" thesis. Accepting a withdrawal of immunity as sufficient to ground a grant of federal jurisdiction raises the question whether Congress may confer jurisdiction by conferring an immunity and then partially (or completely) withdrawing it. If Congress had the power to confer the immunity in the first place, then it is not obvious why the later withdrawal of the immunity would not count as a federal creation of the claim. If Congress can create a claim this way in two steps, why not in one? Questions such as these suggest that implications of "federal claim" analysis are broader than they first appeared. Indeed, in the light of such questions, "slippery slope" concerns might lead the reader to question the soundness of the "federal claim" analysis of *Osborn* and *Verlinden*.

In this Part, I will argue that the implications of "federal claim" analysis are indeed broader. "Federal claim" analysis tells us that Congress may confer jurisdiction over a category of federally-created claims, not just to secure better interpretations of federal law, but to provide a more (or less) hospitable forum for the adjudication of such claims. If Congress can

79. Pub. L. No. 95-393, 92 Stat. 808 (1978).

80. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136, § 301 (1947) (codified as amended at 29 U.S.C. §§ 141-196 (1994)).

81. *Lincoln Mills*, 353 U.S. at 457.

82. S. 1980, 91st Cong. (1969), reprinted in 115 CONG. REC. 10, 460-61 (1969). See *infra* text accompanying notes 100-107.

83. Pub. L. No. 107-42, 115 Stat. 230, § 408(b)(1), (2) (2001). The "unless" clause does not seem to add anything to the Supremacy Clause unless "inconsistent with" is construed as broader than "preempted by." The Act also imposes a damage cap as a matter of federal law. *Id.* § 408(a).

confer jurisdiction for this purpose when the federal claim would not exist but for federal law, then it should be able to do so when it has a special interest in a preexisting category of claims (assuming its interest in those claims falls within one of its legislative powers). Thus, I argue, if Congress has legislative power under Article I, it should be able to "create" federal claims by throwing a federal cloak around an already existing category of claims, declaring them to be federal while specifying that the governing law will remain as before. In other words, Congress should be able to confer jurisdiction by declaring a category of existing claims to be federal claims governed by incorporated state or foreign law. My proposal adds a largely formal requirement to Professor Wechsler's protective jurisdiction theory—the requirement of formal adoption of state law as federal. This requirement addresses both formal and substantive objections that some scholars have voiced about Wechsler's theory.

A. Theories of Protective Jurisdiction

The reluctance of judges and commentators to endorse the broad "remote possibility" test for which *Osborn* is thought to stand has led to the elaboration of alternative tests. Some of these tests have come to be known as theories of "protective jurisdiction." The jurisdictional grant that was the immediate inspiration for the best known theories of protective jurisdiction was § 301 of the Taft-Hartley Act, which authorized federal jurisdiction over claims to enforce labor-management contracts. The two most famous articulations of protective jurisdiction theories—those of Professors Wechsler and Mishkin—were based on the assumption that such contracts would be governed by state law. Professor Wechsler took the position that, as long as Congress possessed the power to displace state law in a given area, Congress could take the less intrusive step of allowing state law to continue to govern while conferring federal jurisdiction on any case falling within the area.⁸⁴ He thought it perverse to insist, in the name of federalism, that, in order to confer federal jurisdiction, Congress must displace substantive state law.⁸⁵ His argument was later taken up by Professors Bickel and Wellington:

In the final analysis the question is this: In exercising its now vast powers under the commerce clause or indeed any of the established powers must Congress, before it is free to employ the federal court system for the effectuation of its object, go the full length of displacing state substantive law? . . . The point is simply that providing a forum for the enforcement of a state law in a field which Congress could occupy is itself a species of regulation, a

84. Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224-25 (1948).

85. *Id.* at 225.

way of seeking a degree of uniformity while leaving the maximum room for the exercise of initiatives by the states.⁸⁶

Thus, according to Wechsler's theory of protective jurisdiction it should not be necessary for Congress to displace state substantive law in order to confer the federal jurisdiction it deems necessary to effectuate its established powers.

Professor Mishkin's theory was somewhat narrower. Concerned that, under Wechsler's theory, there would be no federal statute under which the case could be said to arise except the jurisdictional statute itself, Professor Mishkin proposed limiting Congress's power to confer jurisdiction on the federal courts to fields in which congressional legislation manifests an "articulated and active federal policy."⁸⁷ Under Professor Mishkin's theory, Congress would be able to confer jurisdiction over all cases in such a field, whether or not the particular case was governed substantively by federal law. Under Mishkin's theory, the case would "arise under" the statutes articulating the federal policy, and the point of such jurisdiction would be to ensure that even state-law cases are resolved in a way that protects those federal policies.⁸⁸

According to both theories, federal jurisdiction serves to protect federal interests in a preemptible field. The main difference is that Wechsler would permit a grant of federal jurisdiction even if Congress has not previously exercised its power to legislate substantively in the field, whereas Mishkin would require some previous exercise of this legislative power.

The protective jurisdiction theories have garnered only mixed support in academia.⁸⁹ The Supreme Court has never explicitly endorsed such a theory. In *Lincoln Mills*, Justice Frankfurter considered and rejected both

86. Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 19-20 (1957).

87. Mishkin, *supra* note 1, at 192.

88. *Id.* at 195 ("Even in cases where no specific statutory provision is itself involved, the overall federal policy thus may nonetheless be better protected if all connected litigation is adjudicated by courts well versed in, and receptive to, the national policies established by the legislation.").

89. For generally favorable treatments, see Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933 (1982); Segall, *supra* note 45; Loretta Shaw, Comment, *A Comprehensive Theory of Protective Jurisdiction: The Missing "Ingredient" of "Arising Under" Jurisdiction*, 61 FORDHAM L. REV. 1235 (1993); George D. Brown, *Beyond Pennhurst—Protective Jurisdiction, The Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985). For generally unfavorable treatments, see Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542 (1983); Note, *Over-Protective Jurisdiction?: A State Sovereignty Theory of Federal Questions*, 102 HARV. L. REV. 1948 (1989); John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 NW. U. L. REV. 1188 (1993); James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925 (2004); Young, *Stalking the Yeti*, *supra* note 71.

theories,⁹⁰ while Justices Burton and Harlan endorsed the concept of protective jurisdiction without elaboration.⁹¹ (Burton and Harlan expressed agreement with Judge Magruder's opinion in *International Brotherhood of Teamsters v. W.L. Mead*, which declined to explore the outer limits of protective jurisdiction but endorsed a version along the lines of Professor Mishkin's.⁹²) More recently, in *Mesa v. California*, the Court narrowly construed a statute conferring removal jurisdiction over suits against federal officers in order to avoid the "grave constitutional questions" that would be presented by a broader construction.⁹³ The Court read the statute as permitting removal only when the federal defendant raises a federal defense, believing that a contrary construction would pose potential constitutional problems by permitting a case to arise under the very statute that confers jurisdiction. Recognizing that the broader construction might have been proper under a theory of protective jurisdiction, the Court asserted that it had never found the need to adopt such a theory and that there was no need to do so in the case before it because it had not been demonstrated that state courts were hostile to federal officers.⁹⁴ Thus, although the Court has never rejected the theories, its reluctance to endorse them reflects a decided skepticism.

B. "Federal Claim" Analysis and the Adoption Approach

Before the Supreme Court obviated the Article III issue surrounding § 301 by holding that the provision authorized the articulation and enforcement of a federal common law of labor-management contracts, several lower courts considered the constitutionality of § 301 on the assumption that suits brought under it would be governed by state law. As noted, Judge Magruder would have upheld the section as a valid conferral of protective jurisdiction. In *Textile Workers Union v. American Thread Co.*,⁹⁵ Judge Wyzanski suggested an alternative rationale. He noted that "[t]here is no doubt that under Article I, Sec. 8, cl. 3 of the Constitution Congress can direct that controversies affecting commerce shall be governed by state law,"⁹⁶ and that "if Congress did enact such a law, controversies arising thereunder could be heard by a duly authorized court

90. *Textile Union Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 469-84 (Frankfurter, J., dissenting).

91. *Id.* at 460 (Burton, J., concurring in the result).

92. 230 F.2d 576, 580-82 (1st Cir. 1956).

93. *Mesa v. California*, 489 U.S. 121, 122 (1989).

94. *Id.* at 137-38.

95. 113 F. Supp. 137 (D. Mass. 1953).

96. *Id.* at 140 (citing *Ky. Whip & Collar Co. v. Ill. Cent. R.R. Co.*, 299 U.S. 334; *Williams v. Austrian*, 331 U.S. 642, and *Schumacher v. Beeler*, 293 U.S. 367 (Bankruptcy Act); *Williams v. United States*, 327 U.S. 711 (Assimilative Crimes Act); *Just v. Chambers*, 312 U.S. 383, reh'g denied, 312 U.S. 668 (admiralty)).

established under Article III of the Constitution."⁹⁷ Justice Frankfurter in *Lincoln Mills* understood Wyzanski to be suggesting "that § 301 might be read as containing a direction that controversies affecting interstate commerce should be governed by federal law incorporating state law by reference, and that such controversies would then arise under a valid federal law as required by Article III."⁹⁸ Frankfurter reserved judgment on whether federal jurisdiction over claims arising under federal law adopting state law would satisfy Article III, concluding that § 301 could not be construed as such an adoption.⁹⁹

In the late 1960's, Judge Wyzanski's adoption theory was the apparent basis for the proposed Consumer Class Action Act (S. 3092) proposed by Senator Tydings.¹⁰⁰ This bill was Senator Tydings's second attempt to grant federal courts jurisdiction over consumer claims. His earlier bill, the Class Action Jurisdiction Act (S. 1980),¹⁰¹ would have conferred jurisdiction on the district courts over state-law civil class actions brought by consumers or potential consumers. The purpose of conferring federal jurisdiction was "to counterbalance restrictive State attitudes toward consumer class actions," and to "make[] available the refinements of contemporary Federal court practice, including Federal Rule of Civil Procedure 23, the most modern class action procedure in the United States."¹⁰² In support of congressional power to confer such jurisdiction, the Senator cited Professor Mishkin's "Federal 'Question'" article.¹⁰³ With his substitution of S. 3092, the Senator apparently hoped to obviate questions about the validity of protective jurisdiction by employing an adoption approach.¹⁰⁴ Specifically, S. 3092 provided that "State law relating to the consumers' rights under State statutory or decisional law is adopted as Federal law," and that "Federal law applicable to each case shall be fashioned upon the law of the State and the State statutory and decisional construction shall be applied as if jurisdiction of the Federal

97. *Id.* (citing *Mater v. Holley*, 200 F.2d 123 (5th Cir. 1952)).

98. 353 U.S. at 473 (Frankfurter, J., dissenting).

99. *Id.* ("Whatever may be said of the assumption regarding the validity of federal jurisdiction under an affirmative declaration by Congress that state law should be applied as federal law by federal courts to contract disputes affecting commerce, we cannot argumentatively legislate for Congress when Congress has failed to legislate.").

100. S. 3092, 91st Cong. (1969), reprinted in 115 CONG. REC. 32,141-42 (1969).

101. S. 1980, 91st Cong. (1969), reprinted in 115 CONG. REC. 10,460-61 (1969).

102. 115 CONG. REC. 10,460 (statement of Sen. Tydings).

103. *Id.*

104. See Letter from Charles L. Black, Jr. Luce Professor of Jurisprudence, Yale Law School, to Hon. Bob Eckhardt (May 27, 1969), reprinted in *Hearings on Class Action and Other Consumer Protection Procedures Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong. (2d Sess. 23 (1970)) [hereinafter Black Letter] ("Part of the thought behind this provision, doubtless, is that actions, brought under the laws which thus become a part of federal law, will indisputably 'arise under' the laws of the United States, and so satisfy beyond doubt the requirements of Article III.").

court were based on diversity of citizenship."¹⁰⁵ The bill thus made it clear that the content of the applicable federal substantive law would be identical to the law that would have been applied in the absence of the Act. S. 3092 thus clearly presented the question whether a naked adoption of state substantive law as federal could be the basis of a grant of federal "arising under" jurisdiction to the district courts.¹⁰⁶ The question did not receive a judicial answer, however, because the Consumer Class Action Act never became law.¹⁰⁷

There is no doubt that Congress can adopt state law as federal law. The issue has arisen most prominently with respect to legislation enacted pursuant to Article I, section 8, clause 17, which gives to Congress the power "[t]o exercise exclusive Legislation" with respect to certain federal enclaves. From the beginning, the laws that Congress enacted for such enclaves incorporated the laws of the surrounding states. Initially, Congress followed a policy of "static conformity," incorporating state law as it stood at the time of the enactment of the federal statute.¹⁰⁸ Eventually, Congress shifted to dynamic incorporation, adopting the laws of the surrounding states as they stood at the time of the acts giving rise to the litigation. The Supreme Court upheld such adoption of state law in *United*

105. S. 3092, 91st Cong. § 4(c)(1), (2) (1969).

106. Hereinafter, I shall use the term "naked adoption" to describe a statute providing that the substantive law to be applied is to be the same as the law that would be applied in the absence of the statute in state courts or in federal courts having diversity jurisdiction. But cf. *infra* text accompanying notes 146-148 (noting that the combination of state substantive law and federal procedures may be said to produce a hybrid federal claim).

107. A quarter century later, Congress enacted the Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (2005) [hereinafter CAFA]. Ironically, this law was enacted to provide a less hospitable forum for certain class action claims. See Debra Lyn Bassett, *The Defendant's Obligation to Ensure Adequate Representation in Class Actions*, 74 UMKC L. REV. 511, 529, n.111 (2006). This time, Congress relied on the diversity clause of Article III rather than the "arising under" provision. CAFA at §4. The diversity clause of Article III has been construed to authorize a grant of jurisdiction on the basis of "minimal diversity." See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967). In CAFA, Congress conferred jurisdiction on the federal courts over "any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which any member of a class of plaintiffs is a citizen of a State different from any defendant, any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State, or any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state." § 4(a)(2). The availability of jurisdiction based on minimal diversity largely obviates the protective jurisdiction question for statutes such as CAFA, which are likely to involve at least one party from a different state than another. But cf. James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 Calif. L. Rev. 1423 (2007) (questioning the constitutionality of jurisdiction based on minimal diversity in part because it would permit evasion of Article III's "arising under" clause). In any event, as discussed above, Article III's "arising under" clause permits the conferral of jurisdiction for the purpose of providing a less hospitable forum for the adjudication of federally-created claims.

108. See *United States v. Sharpnack*, 355 U.S. 286, 291 (1958). See generally William Cohen, *Congressional Power to Validate State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 401-05 (1983).

States v. Sharpnack,¹⁰⁹ specifically rejecting the dissent's claim that such adoption constituted an unconstitutional delegation of law-making power to the states.¹¹⁰ The Court cited a number of other contexts in which Congress had adopted state law as federal law.¹¹¹

Whether federal "arising under" jurisdiction can validly be based on a naked adoption of state law as federal is of course a separate question. Judge Wyzanski cited *Mater v. Holley*¹¹² as having upheld federal jurisdiction over a case arising under a federal law incorporating state law. *Mater* was a civil action for negligence within a federal military reservation. The court held that, when the land was transferred by Georgia to the United States for this purpose, "Georgia law as such, and by virtue of Georgia sovereignty ceased to exist, but remained operative as federal law by virtue of the sovereignty of the United States."¹¹³ The court cited, as presenting an analogous problem, *James Stewart & Co. v. Sadrakula*,¹¹⁴ which "held that a section of the New York Labor Law . . . remained in effect 'as federal law' on lands ceded to the United States for a post office site."¹¹⁵ It also cited a statute, 16 U.S.C. § 457, which it described as "expressly adopting as federal law the local law of liability for negligence and wrongful death for places over which the United States has exclusive jurisdiction."¹¹⁶ The court in *Mater* held that the suit arose under federal law even though the governing federal law incorporated the law of Georgia by reference.¹¹⁷ *Mater*, however, was a lower court decision, and it might be distinguished on the ground that state law in that case was incapable of operating of its own force. Whether a naked adoption of state law as federal suffices to ground federal "arising under" jurisdiction outside a geographical area that is "exclusively federal" by virtue of the Constitution thus remains an open question.

Federal claim analysis supports an affirmative answer. It tells us that Congress can confer jurisdiction on federal courts for the purpose of providing a more (or less) hospitable forum for the litigation of claims it has created, whether or not the case requires the construction of federal law or the application of such law to facts. Jurisdiction exists over all such claims even if the substantive federal law governing such claims is identical to the laws of some states on the subject.¹¹⁸ The question is

109. *Sharpnack*, 355 U.S. 286.

110. *See id.* at 297-99 (Douglas, J., dissenting).

111. *Id.* at 294-96.

112. 200 F.2d 123 (5th Cir. 1952).

113. *Id.* at 124.

114. 309 U.S. 94 (1940).

115. *Mater*, 200 F.2d at 124.

116. *Id.*

117. *Id.*

118. In determining whether a case arises under a federal law for purposes of Article III, the Court has never asked whether the federal law differs in substance from the law that would apply if

whether jurisdiction can validly be granted when the substantive federal law governing such claims is identical to the laws of *each* of the states. A requirement that the content of the federal law be different from that of the otherwise applicable state or foreign law might make sense if the reason for federal jurisdiction were to provide a more expert or sympathetic forum for the interpretation of the law.¹¹⁹ However, as Professor Mishkin has taught us, this is not the sole purpose of federal jurisdiction. Congress can confer jurisdiction instead because it believes the federal courts will be more (or less) hospitable to a particular category of case, even when the case presents no occasion to interpret the substantive law or determine how it applies to particular facts—when the only issue is, for example, whether certain alleged facts even occurred. If Congress has the power to create a federal claim on a matter, but Congress's only concern with the status quo relates to the procedures used in the state courts or the state courts' attitudes towards such claims, there would appear to be no reason to deny Congress the power to throw its cloak around such claims by declaring them to be federal and, in this way, to make available the procedures or attitude it prefers.

The differences between naked adoption and protective jurisdiction as techniques for conferring federal jurisdiction over claims governed by state or foreign law may strike some readers as too formal to be of constitutional significance. Both supporters and opponents of protective jurisdiction have regarded the adoption approach as a circumvention of the limits that Article III places on "arising under" jurisdiction. In their view, the adoption technique must stand or fall with protective jurisdiction. Those who are unpersuaded by protective jurisdiction theories regard the adoption technique as equally invalid,¹²⁰ and those persuaded by protective jurisdiction theories regard adoption as superfluous.¹²¹

It is true that the difference between adoption and Wechsler's version of protective jurisdiction is largely formal. Under both approaches, the operative constraint on Congress is its power under Article I to legislate on

there had been no federal law. But cf. *infra* note 130 (discussing Goldberg-Ambrose's approach to Diplomatic Relations Act).

119. Even so, as noted, this has never been a requirement.

120. See Goldberg-Ambrose, *supra* note 89, at 558 ("Incorporation alone should not suffice . . . to fit the claim within a conventional interpretation of the arising under clause of article III because incorporation of state law does not generate any new independent federal rights."); Young, *Stalking the Yeti*, *supra* note 71, at 1802-05.

121. See Note, *Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Actions*, 69 MICH. L. REV. 710, 731 (1971) ("The use of adoption and incorporation of state law solely as a means of providing federal-court jurisdiction should not be countenanced unless the result is one that can be reached within the bounds of a constitutionally valid theory of protective jurisdiction."). Cf. Black Letter, *supra* note 104, at 23 ("firmly adher[ing]" to earlier conclusion that a simple grant of jurisdiction, without more, would be constitutional, but going on to conclude that adoption "furnishes a sound alternative theory on which constitutionality . . . may be based.").

certain subjects. For Wechsler, Congress's power to legislate on these subjects entails a power to confer jurisdiction on the federal courts with respect to those subjects without legislating substantively. The adoption approach requires two steps in place of Wechsler's one. Congress must first enact a federal law declaring that claims in the relevant area shall be deemed federal claims, although the governing federal law shall have the same content as the otherwise applicable law. Having done so, Congress can enact a statute conferring jurisdiction over such claims. If Congress is willing to pass a bare jurisdictional grant, it is also very likely to be willing to pass a naked adoption of state law.

Nevertheless, the adoption approach improves upon Wechsler's suggested approach in two ways. First, it addresses the frankly formal objections to Wechsler's theory. Second, the designation of the relevant claims as federal claims addresses the objection that, by authorizing federal courts to interpret and apply state law, Congress is blurring lines of accountability. In addition, closer examination of the adoption option helps bolster the case for the validity of Wechsler's theory in two ways. First, the quest for a line distinguishing adoption that suffices to ground "arising under" jurisdiction from adoption that is insufficient to do so demonstrates the inadministrability of any such distinction. Finally, the attempt to draw such a line underscores the strength of Wechsler's original structural argument for protective jurisdiction and the perversity of objections to it.

Professor Wechsler's original proposal may well have been constitutionally sound. The refinements of Wechsler's proposal introduced by the adoption approach should eliminate any lingering constitutional doubts.

1. A Formal Solution to a Formal Problem

While the differences between adoption and protective jurisdiction might strike some readers as too formal to matter, it should be recalled that the principal objections to Professor Wechsler's theory raised by Justice Frankfurter and Professor Mishkin were precisely that—formal. In rejecting Wechsler's analysis in *Lincoln Mills*, Justice Frankfurter stressed that the restrictions of Article III were "truly technical," and thus were not "met or respected by a beguiling phrase that the greater includes the lesser."¹²² That Frankfurter might have accepted a truly technical solution to this truly technical problem is suggested by the fact that he rejected Wechsler's theory while reserving judgment on Wyzanski's.¹²³

Professor Mishkin's principal objection to Wechsler's theory was similarly formal: he was concerned that, under Wechsler's approach, there would be no federal law under which the case would arise other than the

122. *Lincoln Mills*, 353 U.S. at 474 (Frankfurter, J., dissenting).

123. *Id.* at 472-73.

jurisdictional statute itself.¹²⁴ Similarly, the "grave constitutional problem[]" that led the Supreme Court in *Mesa v. California* to construe the federal officer removal statute as conferring jurisdiction only when the defendant relies on federal law was the fact that there would otherwise be no federal law under which the case could be said to arise.¹²⁵ The problem that concerned Mishkin and the *Mesa* Court would disappear if Congress enacted a federal statute adopting state law as the governing law. The case would then arise under the provision adopting state law as federal, thus rendering all such claims federal claims.

2. How Much State Law Must Be Displaced?

If a naked adoption of state law as federal were not accepted as a permissible basis for conferring "arising under" jurisdiction, it would be necessary to formulate a basis for distinguishing adoption that does suffice to ground federal jurisdiction from adoption that does not suffice. The line to be drawn presumably would have to rely on the amount of state law that is displaced. The more state law is displaced, the more likely a grant of jurisdiction is to be valid. The question would be: How much state law must be displaced for a federal adoption of state law validly to ground a conferral of "arising under" jurisdiction?¹²⁶ Drawing and administering such a line would pose enormous challenges.¹²⁷ This section discusses the difficulties of articulating and enforcing such a line, and argues that federal claim theory in any event requires the rejection of any line that would preclude Congress from conferring jurisdiction on a subject over which it has legislative power.

It is clear that a case may "arise under" federal law for purposes of Article III if it is based on a federal law that adopts state law in some respects and alters state law in other respects. Federal common law provides an example. Even where federal common law applies, the content of that law is often the same as state law.¹²⁸ In *Lincoln Mills*, for example,

124. Mishkin, *supra* note 1, at 190.

125. 489 U.S. 121, 137 (1989).

126. See Goldberg-Ambrose, *supra* note 89, at 547 ("[W]e must classify cases requiring protective jurisdiction by identifying the point at which there is insufficient federal law to establish that the claim involved arises under federal law, at least in the constitutional sense of that term.").

127. The irony that such an approach validates a jurisdictional grant only if Congress intrudes to a greater extent on substantive state law will be discussed below. My point for now is that, even if such distinctions were not perverse from a federalism perspective, it would be very difficult to draw a line between sufficient and insufficient displacement of state law.

128. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-28 (1979) ("Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules."); *De Sylva v. Ballentine*, 351 U.S. 570 (1956). See generally Paul Mishkin, *The Varyingness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957). In *Kimbell Foods*, *supra*, federal jurisdiction under Article III did not depend on the "arising under" clause because the United States was a party. Nevertheless, in the light of the Court's statement that the case was "governed by

the majority noted that the federal court could adopt state law as the governing rule.¹²⁹ It is also clear that a suit within the scope of § 301 arises under federal law even when the particular case is governed by an adopted state-law rule.¹³⁰ Thus, there is no requirement that the rule that governs the particular case be one that is not adopted from state law. If a naked adoption of state law cannot ground a grant of "arising under" jurisdiction, then it will be necessary to determine how much state law irrelevant to the particular case must be displaced for that case to "arise under" federal law for the purposes of Article III.

Another section of the FSIA helps illustrate the difficulty of the line-drawing problem. Section 1606 of the FSIA provides as follows:

As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state . . . shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the act or injury occurred provides . . . for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.¹³¹

federal law" even though the relevant federal law adopted state law, 440 U.S. at 727, it is clear that the case also arose under federal law for purposes of Article III.

129. *Lincoln Mills*, 353 U.S. at 457 ("[S]tate law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.) See also *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) ("In our choice of the applicable federal rule we have occasionally selected state law.").

130. Professor Young agrees. See *infra* text accompanying note 138 (discussing Young's approach to damage caps). Professor Goldberg-Ambrose has suggested that a § 301 suit between two labor unions might not properly arise under federal law in light of the Supreme Court's suggestion in *United Association of Journeymen v. Local 334*, 452 U.S. 615, 627 (1981), that the federal rule applicable in such cases "might consist entirely of incorporated state law." See Goldberg-Ambrose, *supra* note 89, at 560. Her conclusion appears to be based on the notion that a case arises under federal law for purposes of Article III only when the applicable law differs in substance from the rule that would apply without a federal law. Thus, she suggests that a suit under the Diplomatic Relations Act, 28 U.S.C. § 1364, which authorizes direct actions against insurers of foreign diplomats in certain circumstances, would arise under federal law if the otherwise applicable state law did not authorize direct actions against insurers, but would not arise under federal law if the otherwise applicable state law did authorize direct actions. See Goldberg-Ambrose, *supra* note 89, at 555. As noted above, *supra* note 118, showing that the governing federal law differs in substance from the otherwise applicable law has never been a requirement of the "arising under" statute or the "arising under" clause of Article III. In indicating that the federal common law rule might adopt state law, the Court did not suggest in *Lincoln Mills* or *Clearfield Trust* or *Journeyman* that federal jurisdiction would be affected by that choice. (To be precise, Professor Goldberg-Ambrose states that *Journeymen* suits under § 301 and suits under the Diplomatic Relations Act in states with direct action statutes would not arise under federal law without reliance on a theory of protective jurisdiction. However, she is critical of theories of protective jurisdiction and would accept them only in limited circumstances.)

131. 28 U.S.C. § 1606.

This provision might be understood as a federal adoption of state law. It specifically instructs courts to apply the otherwise applicable state or foreign law to determine the extent of the foreign state's liability.¹³² This federal adoption of state law would suffice to save § 1330 if a naked adoption of state law were recognized as a legitimate basis for "arising under" jurisdiction.¹³³

Even if a naked adoption were not accepted as a basis for conferring federal jurisdiction, § 1606 might save § 1330 because the former alters the applicable substantive law in certain respects. It states that, if death occurs and the otherwise applicable law provides only for punitive damages, the foreign state would be liable for compensatory damages instead. It even specifies how such compensatory damages are to be measured. Clearly, a case would uncontroversially arise under federal law if death occurred and the otherwise applicable law provided only for punitive damages. The court would then have to rely on § 1606 as the sole basis of the damages it was awarding in the case. Does the fact that § 1606 is the sole affirmative source of damages in this small subset of cases mean that all cases under § 1606 arise under federal law for purposes of Article III? If not, how much more state law must be preempted before a federal statute adopting state law may support "arising under" jurisdiction?

Section 1606 can be expected to play a significant substantive role in a much larger set of cases insofar as it preempts state law authorizing punitive damages. Where state law authorizes punitive damages and the facts would support an award of such damages, a conferral of federal jurisdiction would serve to provide a hospitable forum for the federal rule denying such damages. But would this degree of federal displacement of state law suffice to ground federal jurisdiction over a case where the facts would not support an award of such damages under state law? What about a federal statute that adopts state law except insofar as it authorizes punitive damages exceeding compensatory damages, or exceeding twice the amount of compensatory damages, or five times that amount?¹³⁴ What

132. This provision also supports the "federal claim" view defended in Part II. The argument would be that, before the emergence of the restrictive theory of foreign sovereign immunity, because of the absolute immunity of foreign sovereigns, state law did not extend to foreign sovereigns. Later, by virtue of § 1606 itself (or the principles of international law that § 1606 codified), foreign sovereigns became legally liable for injuries caused in certain circumstances. In this sense, claims against foreign sovereigns were created by § 1606, in conjunction with § 1605. For elaboration, see Vázquez, *Federal Jurisdiction Over Cases Between Aliens and Foreign States*, *supra* note 52.

133. Admittedly, Frankfurter might require a more explicit statement that state law was being adopted as federal law. Short of such a statement, the provision might be read simply to make clear that the otherwise applicable law was not being altered except in the limited circumstances mentioned. If a clearer statement were required, however, it could easily be supplied.

134. Professor Young appears to accept the validity of a grant of jurisdiction for suits arising under a federal statute that adopts state law but imposes a damage cap. In discussing the Air Transportation and Safety and System Stabilization Act, he writes that "by limiting an air carrier's total liability to the limits of the carrier's insurance coverage, the Act restricts the operation of state law in

about a federal law placing a cap of \$200,000,000,000 on punitive damages?¹³⁵ Difficult line-drawing inquiries such as these would be avoided under a naked adoption approach.

One line that could conceivably be drawn would accept federal "arising under" jurisdiction on the basis of a federal statute adopting state law if Congress in addition authorized the courts to depart from state law to the extent they found such law to conflict with federal policy. *Lincoln Mills* itself shows that Congress may confer jurisdiction if it is concerned that state law, in some applications, might conflict with federal policy. If Congress has instructed the federal courts to apply state law to the extent consistent with federal policy, federal jurisdiction would be proper over all cases in the field because the possibility of conflict exists in every case and Congress's purpose in conferring jurisdiction is to protect the substantive federal policies in the field.¹³⁶ By contrast, a federal law that merely adopts state law as federal, or adopts state law except on specified issues, does not authorize the federal courts to depart from state law in other respects and does not evince a concern about the content of undisplaced state law.

Before discussing whether the line should be drawn where Congress not only adopts state law but authorizes departure when the adopted law conflicts with federal policy, it is worth noting that this proposed line would validate federal adoption of state law for the purposes Professor Mishkin sought to advance in his theory of protective jurisdiction. Indeed,

an important class of cases. That restriction in itself may constitute a federal 'element' sufficient to support Article III jurisdiction under *Osborn*, at least for claims against air carriers." Young, *Stalking the Yeti*, *supra* note 71, at 1789. If he is suggesting that jurisdiction may be conferred only if federal law alters state law "in an important class of cases," he may not accept such jurisdiction if the cap is so high as to be implicated only in extraordinary cases.

135. Section 1606 may alter state law in another respect. Some lower courts have interpreted this section as instructing the courts to articulate and enforce a federal common law choice of law rule for FSIA cases. The courts that have read § 1606 this way have selected the "most significant relationship" test of the Second Restatement of Conflict of Laws as the federal choice of law rule. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 145. Again, it should be clear that a case arises under federal law for purposes of Article III when the choice of law rule that would apply in the absence of § 1606 is a rule other than that of the Second Restatement. The Court has recognized that choice of law is a substantive issue for *Erie* purposes. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941). By virtue of § 1606, federal law determines which substantive law will be applied to resolve the case on the merits. It does so by incorporating a state or foreign rule rather than by providing a rule of its own, but the choice of the governing rule is itself designed to achieve federal policy interests. The question, then, is whether the case would arise under federal law for purposes of Article III in all FSIA cases or just in the cases in which the otherwise applicable choice of law rule differed from the federal choice of law rule. A constitutional test that turned on such a comparison seems implausible.

136. Professor Young agrees:

[E]very time a court deciding a case within the scope of federal common lawmaking authority elects to apply state law, it must decide whether the particular state rule in question creates a conflict with federal policy. . . . This federal element is at least as substantial as that presented by the federal status of the Bank in *Osborn*.

Young, *Stalking the Yeti*, *supra* note 71, at 1786 (emphasis in original).

on this view, adoption could be used to confer jurisdiction over a somewhat broader category of cases than Mishkin would allow, as it would not be necessary for Congress to have legislated an "articulate and active" policy in the field. The relevant federal policy could come instead from other sources.¹³⁷ This adoption approach would be more restrictive than Professor Mishkin's approach only insofar as it would require Congress formally to adopt state law as federal law and authorize the federal courts to depart from state law if necessary to protect federal policies.

Although it is clear that a statute of the sort described above would validly support federal "arising under" jurisdiction, there are significant reasons for doubting that this should be the only sort of adoptive statute that can do so. It would be odd to say that federal jurisdiction would exist when Congress delegates to the courts the power to preempt some state law, but not when Congress itself specifies the extent of preemption. In the former case, federal jurisdiction would be justified because of the need for federal courts to make judgments in every case about the extent to which state law impinges upon federal policy. Federal claim analysis shows, however, that federal jurisdiction is necessary in the latter case to provide a hospitable forum for the vindication of the policies Congress has enacted. For example, if Congress enacts a statute creating a federal right of action for the enforcement of certain contracts affecting interstate commerce, specifying that such actions shall be governed by state law except to the extent such law authorizes punitive damages, federal jurisdiction over such claims would be justified to guard against state courts vitiating the damage limitation by, for example, manipulating compensatory damages. In his contribution to this symposium, Professor Ernest Young appears to agree that "arising under" jurisdiction can be conferred over cases arising under such a statute, even if the federal alteration of state law is not implicated in the particular case, as long as the alteration implicates "an important class of cases."¹³⁸ If so, the line-drawing problem recurs.

Another possible line would allow a case to arise under a federal statute adopting state law as long as it displaces (or authorizes the courts to displace) *some* substantive state law, no matter how little. If this were the only requirement, Congress would have very little difficulty meeting it, particularly if "substance" were understood to include such matters as remedy and choice of law (as it should be). The trouble with drawing the line here is that it would preclude Congress from conferring federal jurisdiction to promote procedural policies. Numerous actual or proposed jurisdictional grants have sought to take advantage of the procedural

137. See Vázquez, *Federal Jurisdiction Over Cases Between Aliens and Foreign States*, *supra* note 52, at 1083 (arguing that § 1330 could be upheld under Mishkin's theory of protective jurisdiction even though the relevant federal policies to be protected would not have emanated from Congress).

138. Young, *Stalking the Yeti*, *supra* note 71, at 1789 (discussing damage caps).

advantages of the federal courts. As noted, Congress in enacting § 1330 wanted to give foreign states the ability to avoid jury trials.¹³⁹ The FSIA also authorizes the exercise of personal jurisdiction on the basis of minimum contacts with the United States as a whole, rather than minimum contacts with a particular state, as the Due Process clause would require in the state courts.¹⁴⁰ The Class Action Jurisdiction Act and the Consumer Class Action Act would have conferred jurisdiction on the federal courts in certain suits brought by consumers for the purpose of making available to plaintiffs the class action procedures available in federal courts.¹⁴¹ In the bankruptcy context, federal jurisdiction was desired in part to permit easier coordination and transfer of cases.¹⁴²

If Congress believes that state procedural rules adversely affect interstate or foreign commerce, then it is not obvious why Congress should be barred from addressing that problem by making available the federal procedures that it regards as preferable. Conferral of federal jurisdiction may be the only way for Congress to address the problem. The alternative would be to impose the preferred procedures on the state courts. But certain procedures could not be imposed on state courts (such as the exercise of personal jurisdiction on the basis of contacts with the nation as a whole¹⁴³), and others could not be advanced except in a national judicial system (such as promotion of ease of transfer). Professor A.J. Bellia has made a forceful argument that the Constitution altogether prohibits Congress from imposing procedures on the state courts in state-law cases.¹⁴⁴ If so, then Congress's only option would be to confer federal jurisdiction. To deny Congress the power to promote procedural policies by conferring federal jurisdiction would effectively deny Congress the power to promote those policies at all. The constitutional basis for reading Article III to deny Congress the power to address interferences with interstate commerce caused by state procedural rules is elusive.¹⁴⁵

139. H.R. REP. NO. 94-1487, at 6631-32 (1976); DELLAPENNA, *supra* note 50, at 660-61.

140. FED. R. CIV. P. 4(k) advisory committee's note (amended 1993).

141. See *supra* text accompanying notes 100-107.

142. Susan Block-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 FORDHAM L. REV. 721, 792 (1994); Cross, *supra* note 89, at 1238; Thomas Galligan, *Article III and the 'Related To' Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1, 6 (1987).

143. Personal jurisdiction in state courts is governed by the Due Process clause of the Fourteenth Amendment, which requires minimum contacts with the state. Personal jurisdiction in federal courts, on the other hand, is governed by the Due Process clause of the Fifth Amendment, which permits the exercise of jurisdiction on the basis of minimum contacts with the nation. See, e.g., *United Rope Distribs., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532 (7th Cir. 1991).

144. See generally Anthony J. Bellia, *Federal Regulation of State Procedures*, 110 YALE L.J. 947 (2001).

145. Even if the Constitution does not prohibit Congress from imposing procedures on state courts, Professor Bellia has persuasively shown that doing so would be severely intrusive. Bellia, *supra*

As Professor Bellia and others have observed, state substantive rules are adopted against the background of state procedural rules, and the latter are often designed to interact with the former.¹⁴⁶ To engraft federal procedural rules to state substantive law is effectively to create a new hybrid claim.¹⁴⁷ This is, of course, a reason for Congress to be cautious in conferring federal jurisdiction over claims governed by state substantive law or imposing federal procedures on state-law claims litigated in state court. It should also be clear that Congress lacks the power to impose federal procedures if it lacks the power to legislate substantively. But, if Congress has the power to legislate substantively over a given class of cases, the very fact that state substantive law will be accompanied by different procedures makes the claim created by the naked adoption of state substantive law a distinctly federal claim. As Charles Black said about the proposed Consumer Class Action Act, by making the class action procedure available, "this bill . . . would be in effect creating a new joint right of action, and whether you call that right substantive or procedural is material for law students in a jurisprudence course, but not for the practical concerns of Congress. It is in effect something new, a new species of right."¹⁴⁸ A hybrid claim of this sort should be deemed to arise under the federal law that created it. If the engrafting of federal procedures were recognized to create a hybrid claim arising under federal law, then naked adoption would appear to permit a grant of jurisdiction unless Congress specifies that the federal courts are to apply state procedures, which it is very unlikely to do.

Would a grant of federal jurisdiction be valid if Congress adopted even the procedures of the states? Again, federal claim analysis suggests an affirmative answer. As discussed above, federal claim analysis tells us that Congress can confer jurisdiction over a category of federal claims for the purpose of making available a more (or less) hospitable forum. It is for this reason that federal jurisdiction is appropriate when federal law creates the right of action even when the case presents no dispute about the meaning or application of federal law. The desire to provide a more (or less) hospitable forum would appear to justify federal jurisdiction as well when Congress has the constitutional power to legislate on the subject but has no objection to existing law with respect to both substance and procedure.

note 144, at 989. From the states' perspective, conferring jurisdiction on the federal courts instead would appear to be the preferable option.

146. Bellia, *supra* note 144, at 994.

147. *Id.* at 995. See also Goldberg-Ambrose, *supra* note 89, at 605 ("If a federal court utilizing more liberal federal class action procedures entertains claims arising under these state laws, the state's policy may be significantly distorted.").

148. *Hearings on Class Action and Other Consumer Protection Procedures Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong. 26 (1970).

Because the subject is within Congress's legislative power, Congress has a constitutional basis for caring how these cases are resolved. If a desire to provide a more (or less) hospitable forum is a valid reason to confer federal jurisdiction over federal claims governed by federal law that displaces state law, then it should be an equally valid reason to confer jurisdiction over a category of claims over which it has legislative power and is willing to declare to be "federal," even if it wishes the cases to be resolved through the application of the otherwise applicable law.

3. The Perversity of Requiring Greater Displacement of State Law

Even if a stable line could be drawn as to the degree to which a federal statute must displace state law before it may ground "arising under" jurisdiction, the search for the line reveals a deeper problem. A statute adopting state law as federal would stand a greater likelihood of supporting "arising under" jurisdiction if it displaced more state law. It would be more likely to fail the test if it displaced less state law. If the point of jurisdictional limits imposed by Article III is to protect the states, it is perverse to require Congress to displace more state law to successfully confer federal jurisdiction when its legitimate purposes would be served by displacing less. This is, of course, the central structural insight on which Professor Wechsler based his theory of protective jurisdiction. The greater power to confer federal jurisdiction by displacing substantive state law includes the lesser power to confer federal jurisdiction without displacing state law.¹⁴⁹ It is a powerful argument for accepting Wechsler's theory of protective jurisdiction, and it is even more powerful as an argument for accepting a congressional authority to confer federal jurisdiction through the adoption of state law as federal.

Article III's enumeration of categories of cases within the federal judicial power serves to protect the constitutional prerogatives of the states, just as Article I's enumeration of the powers of Congress serves to protect the states. The potential scope of federal jurisdiction under Article III is thus a federalism issue. Reading Article III too broadly offends state interests by withdrawing too many cases from the exclusive jurisdiction of the states' courts. Under the "arising under" provision, however, one way that Congress can withdraw cases from the exclusive jurisdiction of state courts is by enacting a substantive federal law displacing state substantive law that would otherwise govern such cases. The question before us is whether federal jurisdiction can be conferred where Congress could displace state law but prefers not to. If Congress's purposes are served by the mere conferral of jurisdiction, and those purposes fall within Congress's Article I power, then it would be perverse to allow Congress to

149. See Wechsler, *supra* note 84, at 238-40.

confer jurisdiction over such cases only if it takes the additional step of displacing substantive state law. Conferring federal jurisdiction by displacing state law is more intrusive from a federalism perspective than conferring federal jurisdiction without displacing state law.

There are circumstances in which the law imposes on an actor the choice between acting fully (or meeting a minimum threshold) or not at all. But the exceptional and disfavored nature of such a choice is suggested by the name we have given it—a Hobson's choice. Such Hobson's choices have been rejected in the Article III context. The greater power not to create lower federal courts at all has been understood to include the lesser power of creating them but giving them less than the full permissible jurisdiction under Article III. The argument that Article III leaves Congress with the choice of either creating lower federal courts and granting them the full jurisdiction permitted by Article III or not creating lower federal courts at all has been dismissed by the Court out of hand.¹⁵⁰

When we do accept such Hobson's choices, it is for policy reasons that show the choice not to be illogical. For example, we permit a person to stand by while a stranger drowns, but if he chooses to come to the rescue, we hold him to a minimum level of competence. The greater power to stand by does not include the lesser power to rescue negligently because, by coming to the rescue, the incompetent good Samaritan makes it more difficult for a competent good Samaritan to act effectively. When we take account of the need to leave open the possibility of a competent rescue, it turns out that an incompetent rescue is worse than no rescue at all. Thus, rescuing incompetently is not a "lesser" option included in the power to stand by without acting.

Some scholars who have criticized Professor Wechsler's claim that the greater power to displace state law includes the lesser power of conferring federal jurisdiction without displacing state law appear to contest the very idea that the existence of a greater power presupposes the existence of a lesser one. For example, it has been noted that, even though Congress has the power to decline to fund certain activities altogether, it lacks the power to decide to fund such activities only for people of certain races or religions.¹⁵¹ This example, however, does not contradict the claim that a greater power includes a lesser one. It merely illustrates that powers can be said to be "greater" or "lesser" along any number of dimensions. Thus, while the power to deny funding altogether may be greater than the power to deny funding to the activities of certain races from the perspective of the Spending Power, it is not a greater power from the perspective of the

150. *Sheldon v. Sill*, 49 U.S. 441 (1850).

151. *Goldberg-Ambrose*, *supra* note 89, at 590, n.261.

Equal Protection Clause.¹⁵² The Equal Protection Clause measures policies according to an anti-discrimination metric. From this perspective, the power to deny funding based on race is clearly the greater power. The trick is to identify the correct axis along which to measure the extent of the power. Because the scope of Congress's power to confer jurisdiction on federal courts is a federalism issue, the relevant metric is the extent to which the exercise of the power would impinge upon state interests.

Scholars have also argued that, even using the proper metric, the power to displace state law substantively is not greater than the power to confer jurisdiction without displacing state law. One version of this argument stresses that, while a displacement of state law would intrude upon state interests to a greater extent if passed, a mere conferral of jurisdiction would be much easier to pass.¹⁵³ The claim appears to be that an easier-to-enact option is more of a threat to state interests (and thus a "greater power" from a federalism perspective) than one that is more difficult to get enacted.

The validity of this objection to Wechsler's argument is questionable even in theory. Professor Michael Herz, whose article points out a number of respects in which "greater-includes-the lesser" arguments can be a trap, thinks that this particular objection is not valid:

It is more a political than a legal argument. In certain circumstances, those challenging a particular exercise of government authority will happily call the government's bluff, willing to run the (minimal) risk that the government will exercise its theoretical power to make them even worse off than by the exercise of the lesser power. This is rather like the prosecutor who chooses not to have the jury instructed as to a lesser included offense, predicting that it is unlikely to convict on the offense charged and not wanting to give it any other option than acquittal. Just as the mere fact that the attorney is willing to run the risk does not mean that the jury cannot convict of the offense charged, so it is not clear why the unlikelihood that the government would exercise its greater power means it is unable to exercise the lesser. Even if the greater power has disappeared for all practical purposes, why did it take the lesser with it? If the question is whether the Constitution constrains certain activity (the lesser), the

152. It is for this reason that the Supreme Court's reliance on the argument that "the greater power includes the lesser" in *Posadas de Puerto Rico Associates v. Tourism Board of Puerto Rico*, 478 U.S. 328, 345-46 (1986), was questionable. See *id.* at 355 n.4 (Brennan, J., dissenting); Michael Herz, *Justice Byron White and the Argument That The Greater Includes the Lesser*, 1994 BYU L. Rev. 227, 270 & n.146 (1994) (discussing *Posadas*). It is for the same reason that, from the perspective of the Equal Protection Clause, the power not to establish lower federal courts does not include the power to limit their jurisdiction to suits brought by persons of a particular race or gender.

153. Young, *Stalking the Yeti*, *supra* note 71; Goldberg-Ambrose, *supra* note 89, at 591 (displacement of state law may not be "realistically open to Congress").

fact that non-constitutional considerations constrain other, greater measures is beside the point.¹⁵⁴

The "easier-to-enact" objection seems particularly misguided here. While it may be true that a statute that displaces state law would be more difficult to enact than a statute that merely confers jurisdiction, it is important to recall that the reason that a statute substantively displacing state law would be more difficult to get enacted is precisely *because* it is more intrusive of state interests. Far from showing that the naked jurisdictional grant is not a lesser power, the comparative ease of enacting such a law merely shows that the political process is operating to protect the states from the more intrusive option. It is not clear why the fact that the political process is working to protect the states from a more intrusive option should be a reason to deny Congress the power to pass a less intrusive option for which there is sufficient support.

Professor Young argues that the comparative difficulty of enacting a statute that substantively preempts state law does not necessarily mean that the political process is successfully protecting the states' interests, but may instead reflect the difficulty of getting agreement in both Houses of Congress on the relevant substantive rules. But there is no requirement that Congress agree on all the substantive rules. As we have seen (and as *Lincoln Mills* illustrates) Congress can instead instruct the federal courts to

154. Herz, *supra* note 152, at 241-42. See also John H. Garvey, *The Powers and the Duties of Government*, 26 SAN DIEGO L. REV. 209, 216 (1989) ("The problem with [the argument that the 'greater' option is not in practice available] is that it confuses 'ought' with 'can.' . . . Think about the ultra vires doctrine . . . The charter of X Corporation permits it to boycott Y Corporation, but X's board of directors would never agree to such a proposal. The board would agree to buy from Y only at a lower price. Is this proposal ultra vires? Probably not. If boycotts are OK, less drastic measures probably are too. It is a question of what the charter allows. The board's approval has no bearing on that question."). It is also noteworthy that the power to disestablish the lower federal courts is thought to include the power to limit their jurisdiction even though it would clearly be much easier to do the latter than the former.

Professor Herz briefly considers Justice Frankfurter's objections to Wechsler's "greater-includes-the-lesser" argument. While noting that Frankfurter did not elaborate as to why he was rejecting the argument, Herz suggests that the explanation might have had to do with the strength of the federal government's justification for the grant of jurisdiction. Herz recognizes that, "in terms of the intrusion on state authority, to open the federal courts to state claims is "less" than supplanting state law altogether." Herz, *supra* note 152, at 249. But he suggests that, "if the federal interest justifying [the opening of the federal courts to state claims] is proportionately even smaller [than the federal interest in supplanting state law altogether] then the first might be unconstitutional even though the second is not." *Id.* I suppose this might be true if the constitutional test turned on the strength of the state interest in conferring jurisdiction. But the constitutional test for the validity of jurisdiction-conferring statutes does not turn on the strength of Congress's interest in conferring federal jurisdiction. Surely Frankfurter was not contemplating such a test when he spoke of the "truly technical requirements of Article III." Moreover, if the test did turn on the strength of the federal interests, it would be necessary first to consider the sorts of interests that would be legitimate. For the reasons I discussed above, a federal interest in providing a more (or less) hospitable forum is a legitimate federal interest under Article III. Whether this interest is strong enough to justify a grant of jurisdiction over any particular category of cases within Congress's Article I powers is a judgment that in my view belongs to Congress.

develop federal rules in common-law fashion. Professor Young regards prevailing doctrine on this point to be mistaken. He argues that Congress should not be allowed to delegate largely unguided law-making power to the courts. Be that as it may, my proposed construction of Article III takes existing doctrine outside Article III as its starting point. It assumes that Congress can adopt state law, and that it can preempt state law, as it did in *Lincoln Mills*, by instructing the courts to articulate and enforce federal rules (or adopt state rules) to accord with general and largely unarticulated federal interests.

Scholars have attempted to articulate a constitutional policy that would make it logical to permit Congress to confer "arising under" jurisdiction only where substantive state law is displaced. In my view, the arguments are unpersuasive. One such argument emphasizes that one purpose of Article III (or the Tenth Amendment) is to protect the states' control over the interpretation and application of state law.¹⁵⁵ Thus, Professor Young argues that protective jurisdiction threatens "the state courts' supremacy as expositors of state law."¹⁵⁶ And Professor Goldberg-Ambrose is concerned that "protective jurisdiction . . . results in loss of control by state citizens over the development of state law" because it "den[ies] state citizens the opportunity to influence such decisions through the direct or indirect selection of state judges."¹⁵⁷

That this argument is off-base is suggested by the fact that the adopted law will not always be state law. If a federal statute adopts the "otherwise applicable law," the adopted law will sometimes be foreign. Presumably, any objection to protective jurisdiction would have to be based on the fact that the governing law is non-federal, not that it is state law. Of course, the choice of foreign law will usually be dictated by state choice-of-law rules—but not always. The Due Process clause will sometimes require the application of foreign law.¹⁵⁸ Even if foreign law is being applied because state choice-of-law rules dictate, the link to the state's interest in controlling the interpretation and application of its own law seems exceedingly tenuous when the substantive law being applied is that of a foreign country.

In any event, it cannot be said that the Constitution gives the state courts exclusive power to interpret and apply state law. State law is frequently applied in the courts of other states. Federal courts apply state law in diversity actions, and even to resolve particular issues in actions

155. See Carol E. Goldberg-Ambrose, *supra* note 89, at 595-602; Young, *Sorting Out the Debate*, *supra* note 61, at 426; Note, *Over-Protective Jurisdiction?*, *supra* note 89, at 1956-63.

156. Young, *Stalking the Yeti*, *supra* note 71, at 1799.

157. Goldberg-Ambrose, *supra* note 89, at 604.

158. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (discussing Due Process limits on choice of law).

arising under federal law.¹⁵⁹ The application of the law of a sister state and federal application of state law in suits arising under federal statutes cannot be distinguished on the ground that state law is being applied in such circumstances out of deference. The same could be said when Congress establishes a federal claim pursuant to its undoubted Article I power but specifies that it shall be governed by the otherwise applicable state law. Congress could have displaced the state law but chose not to do so.

It has been argued that federal application of state law in diversity cases is less threatening to the states' power to control the interpretation of their own law than a federal grant of jurisdiction over a particular class of cases because the existence of diversity is fortuitous and unpredictable, whereas a grant of "arising under" jurisdiction poses a more systematic threat to the state's interest in controlling the interpretation of particular categories of state law.¹⁶⁰ But, if Congress could have preempted that category of state law altogether, it is unclear how the states are worse off with a naked adoption accompanied by a jurisdictional grant. Surely the states' ability to interpret and apply state law in a given field is affected even more by congressional displacement of state law in the field. Where state law is being applied by federal courts pursuant to federal adoption, state law is no longer being applied *as* state law. The state's interest in controlling the interpretation and application of its own law is respected by the state courts' exclusive jurisdiction (absent diversity or ancillary jurisdiction) over state law falling outside the scope of the adoption. Indeed, where Congress decides to retain state law as the governing law in a federal right of action, the state courts' interest in controlling the interpretation of state law is being respected even more than when it displaces state law. Although cases within the scope of the adoption would mostly be litigated in federal courts, state courts would retain the power to interpret particular issues of state law in cases falling outside the scope of the adoption, and those interpretations would have to be followed by the federal courts if the same issues arose in cases falling within the scope of the adoption.

As noted above, a grant of federal jurisdiction would clearly be valid if a federal statute adopted state law while authorizing departures from the state courts' interpretation in the event of a conflict with federal policies.¹⁶¹

159. See, e.g., *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (holding that state law determines who is a "child" for purposes of the Copyright Act).

160. See Young, *Stalking the Yeti*, *supra* note 71, at 1801 (emphasizing that diversity jurisdiction, unlike protective jurisdiction "does not remove entire categories of state claims from state court cognizance"; federal jurisdiction in diversity cases is "sporadic" and "not concentrated in particular area of state law"); Note, *Over-Protective Jurisdiction?*, *supra* note 89, at 1960; Goldberg-Ambrose, *supra* note 89, at 607 ("What distinguishes protective jurisdiction from diversity, pendent or ancillary, or other-state jurisdiction . . . is its systematic displacement of state courts.").

161. Professor Young agrees. See Young, *Stalking the Yeti*, *supra* note 71, at 1786 (arguing that a statute authorizing federal common law-making in such a fashion could be the basis for "arising

If so, then it seems paradoxical to object—based on the threat to the states' interest in controlling the interpretation of their own law—where Congress has directed *closer* adherence to state court interpretations, as the Consumer Class Actions Act would have done.¹⁶² In sum, from the perspective of a state's interest in interpreting and applying its own law, it would appear that congressional displacement of state law is at least as objectionable as congressional conferral of federal jurisdiction based on federal adoption of state law in a given field.

Professor Young has also argued (without “press[ing] the . . . criticism too far”¹⁶³) that protective jurisdiction is problematic because it is an affront to the dignity of state courts. The “state dignity” rationale has been controversial when invoked as a reason to entitle states to an immunity from being sued without their consent.¹⁶⁴ As a basis for rejecting a particular construction of a constitutional grant of jurisdiction, it seems to prove too much, given that Article III explicitly authorizes federal court jurisdiction over state-law suits based on assumptions that might be similarly offensive to the dignity of the state courts. Justice Story's response when the Virginia Court of Appeals invoked a similar dignitary concern is worth considering here:

Admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit,) it does not aid the argument. It is manifest that the constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. . . . The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or

under” jurisdiction because “every time a court deciding a case [under such a statute] elects to apply state law, it must decide whether the particular state rule in question creates a conflict with federal policy”).

162. Professor Young fears that protective jurisdiction would promote “substantive law ‘creep’” even when Congress disavows any intent to preempt substantive state law, *see* Young, *Stalking the Yeti*, *supra* note 71, at 1799, but it is difficult to see why this should be an Article III problem if a congressional statute mandating application of state law unless such law conflicts with federal policy would pass muster, as he concedes, *see id.* at 1785-1786.

163. Young, *Stalking the Yeti*, *supra* note 71, at 1799.

164. As Professor Young notes, this rationale played a role in cases such as *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002). For criticism of the “dignity” rationale, *see* Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1962 (2003); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 7 (2003).

foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts.¹⁶⁵

Of course, one might distinguish between affronts to state-court dignity that violate Article III and those that do not, but then we would have to answer the constitutional question before concluding that the state court's dignity has been invalidly offended. In any event, a grant of jurisdiction over a federal claim adopting state law would not "have as its sole justification a belief in the inadequacy of state tribunals in determining state law."¹⁶⁶ As explained above, Congress would be conferring jurisdiction in such cases not to ensure a more correct interpretation of the law, but to provide a more (or less) sympathetic forum for the adjudication of certain categories of claims. The grant reflects a judgment about the dispositions of state courts as compared to federal courts, not their legal competence.

Other scholars have objected that denying state courts control over the interpretation and application of state law infringes the constitutional interest in maintaining clear lines of accountability between the government and the governed.¹⁶⁷ Professor Goldberg-Ambrose presciently invoked such concerns as a reason to invalidate grants of protective jurisdiction years before the Supreme Court embraced them as a reason to reject federal laws that commandeer state legislatures¹⁶⁸ and state executive officials.¹⁶⁹ In *New York v. United States*, the Court struck down a statute requiring state legislatures to legislate in a federally prescribed way because,

where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished¹⁷⁰

The Court in *Printz v. United States* invoked a similar accountability concern in striking down a statute requiring state executive officials to

165. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

166. Young, *Stalking the Yeti*, *supra* note 71, at 1799 (quoting *Lincoln Mills*, 353 U.S. at 475 (Frankfurter, J., dissenting)).

167. See Carol E. Goldberg-Ambrose, *supra* note 89, at 600 (1983).

168. See *New York v. United States*, 505 U.S. 144 (1992).

169. See *Printz v. United States*, 521 U.S. 898 (1997).

170. *New York*, 505 U.S. at 168-69.

enforce a federal regulatory program.¹⁷¹ Similarly, Professor Goldberg-Ambrose argues that "[a]ccountability is disturbed by the confusion of authority and control."¹⁷² If the federal courts are given jurisdiction over claims governed by state law, "state officials [will] lack control over those claims, [but] state citizens will hold them responsible because the claims are . . . under state law."¹⁷³

There are two principal problems with the accountability argument when employed as a criticism of the naked adoption approach.

First, the Supreme Court has recognized that the blurring of lines of accountability is not constitutionally problematic when the *courts* of one government are required to enforce laws created by the other. It has recognized that state courts can be required to enforce federal law despite the possibility that the states might be erroneously blamed for the federal policies it is enforcing. That is because the Supremacy Clause expressly requires state judges to enforce federal law.¹⁷⁴ Presumably, the court would reach the same conclusion where Article III authorizes the federal courts to entertain claims based on state law, as it clearly does in diversity cases or where a state claim is ancillary to a federal claim.¹⁷⁵

Second, the Supreme Court decisions resting on the blurring of lines of accountability assume that, if confusion results, it will adversely affect the government whose officers are enforcing the law, not the government whose law is being enforced. Thus, according to the Court in *Printz*, the accountability problem produced by a federal law commandeering state executive officials is that "it will be the [state official] and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the [state official], not some federal official, who will be blamed for any error . . . that causes a purchaser to be mistakenly rejected."¹⁷⁶ In other words, the problem is that the public will

171. *Printz*, 521 U.S. at 930 (holding that federal commandeering offends accountability because state officials are "put in the position of taking the blame for [the] burdensomeness and . . . defects" of federal programs).

172. Goldberg-Ambrose, *supra* note 89, at 604. See also *id.* at 600 (state autonomy "insures that citizens will 'know whom to hold accountable'" (quoting *Lewis Kaden, Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 857 (1979); Goldberg-Ambrose, *supra* note 89, at 602 ("The public . . . seems unable to separate the bearer of bad tidings from the true source of the law.")).

173. Goldberg-Ambrose, *supra* note 89, at 605.

174. See *Printz*, 521 U.S. at 907; *New York*, 505 U.S. at 178.

175. Professor Bellia has argued that the Tenth Amendment does place some limits on Congress's power to commandeer state courts. Specifically, he argues that Congress must take state courts as it finds them and thus cannot require them to adjudicate state claims using federally-prescribed procedures. See Bellia, *supra* note 144, at 959. Even if he is right, it does not follow that Congress may not authorize federal courts to adjudicate state claims according to federal procedures. Much less does his argument suggest that Congress cannot authorize federal courts to adjudicate federal claims incorporating state law by reference.

176. *Printz*, 521 U.S. at 930.

erroneously blame the messenger. Thus, while it may be true that "[t]he public . . . [is] unable to separate the bearer of bad tidings from the true source of the law,"¹⁷⁷ the constitutional problem the Court has identified is that the public will erroneously blame the bearer of the bad tidings instead of the true source of the law. If so, then the states' interests are not adversely affected when federal courts are authorized to adjudicate claims governed by state law. If there is an accountability problem, it is that the federal government will be mistakenly blamed for policies having their source in the states.

Even this problem would be solved by a federal statute adopting the state law as federal law. Given such adoption, it would not be a mistake for the federal government to be blamed for the policies being enforced by the federal courts. The federal government *should* be held accountable for its decision to adopt state law. The problem that Professor Goldberg-Ambrose identifies exists where the claims being enforced by the federal courts are "nominally under state law."¹⁷⁸ If so, then there would appear to be no problem with federal courts enforcing claims that are "nominally" federal even if the relevant federal law adopts state law.

In short, Professor Wechsler was right to maintain that the greater power to displace state substantive law in a given field includes the lesser power to grant jurisdiction over cases within that field. Any plausible objection based on the state courts' interest in maintaining control over the interpretation and application of their own law would be adequately addressed by the enactment of a federal law making it clear that federal courts adjudicating cases in the field are enforcing state law only because that law has been adopted by Congress as federal law. Such an adoption would also make it clear to anyone who cares that Congress rather than the states should be blamed for the relevant policies.

CONCLUSION

This Article advances a "federal claim" rationale for upholding statutes conferring jurisdiction on the federal courts that builds upon Professor Mishkin's key insight that the purpose of the district courts' original jurisdiction under Article III's "arising under" provision is not solely, or even primarily, to resolve federal questions. Another, potentially more important purpose, is to provide a more (or less) hospitable forum for the adjudication of rights created by federal law. For purposes of the "arising under" statute, jurisdiction exists if federal law created the plaintiff's claim by providing the substantive law being applied. For purposes of the parallel provision in Article III, it is enough if federal law creates the claim by creating the party or by removing an otherwise

177. Goldberg-Ambrose, *supra* note 89, at 602.

178. *Id.* at 605.

applicable immunity. Additionally, Congress may create a federal claim by taking a category of preexisting state claims and declaring them to be federal claims governed by adopted state law. If Congress objects to the attitudes of state courts with respect to a particular category of claims falling within its legislative power, but has no objection to the applicable state substantive laws, it should be able to advance its interests by declaring the claims to be federal claims and conferring federal "arising under" jurisdiction over them. Federal claim analysis tells us that Congress may confer jurisdiction over claims created by federal law for the purpose of providing a more (or less) hospitable forum for their adjudication. This is a valid purpose of a grant of federal jurisdiction even if the federal law governing the claims consists entirely of adopted state law.